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JUDGES
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Essays in Honour of Justice V. R. Krishna Iyer

Edited by

RAJEEV DHAVAN, R. SUDARSHAN
and
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PREFACE

This book of essays is a tribute of a community of scholars to Justice V. R. Krishna Iyer in recognition of his creative contribution to justice through the law.

Justice Krishna Iyer's achievements as a judge are only a small part of his distinguished career in public life. He enrolled as an advocate in 1938 and built up a formidable reputation as the defender of the rights of workers and peasants. As a legislator in the Madras State Assembly during 1952-56, he was instrumental in introducing provisions for fair rent in the Malabar Tenancy Act, and formulated provisions governing agrarian relations to do justice to tenants and landless labourers. He was elected to the Kerala State Assembly in 1957, and was a Cabinet Minister holding the portfolios of Law, Home, Irrigation, Electricity, Prisons, Social Welfare and Inland Navigation until the dismissal of the Communist Party-led coalition Government in 1959.

During his short spell as Minister, he pioneered innovative changes in judicial administration, legal aid to the poor, reform of laws which discriminated against women, and promoted measures for greater citizen involvement in the judicial process. He initiated a water resource management scheme for the State with a zeal and enthusiasm that few can match. Although it is over 25 years since he held the irrigation portfolio, Justice Krishna Iyer has a thorough grasp of the subject. He recently took the trouble of preparing an *aide-memoire* to the present administration in the State on some of the irrigation schemes which he had conceived of as beneficial but which have still not been implemented.

As a citizen Justice Krishna Iyer's untiring engagement in public life and critical issues of the day should serve as a model. There are many social and professional organisations which have benefited from his services, including the Society for the Prevention of Cruelty to Animals, sports councils, fine arts societies and academic bodies. Even if he had never become a judge, Justice Krishna Iyer's contributions to public life would remain an object lesson on the importance of the virtues of justice and courage.

When Justice Krishna Iyer joined the Bench of the Kerala High Court in 1968, it opened up new opportunities for him to continue his quest for justice, and the virtues necessary to sustain a just community. Among them is the striving for excellence and a critical spirit of inquiry which has inspired the contributors to this volume. Rather than produce a book about the man, we have here a book about judges and the judicial power knowing that Justice Iyer would be the first to acknowledge that ideas and the collective action of human beings are always more important than any single individual. The last essay in this book, however, provides the reader an account of the creativity of Justice Krishna Iyer as a judge of the Supreme Court.

The first part of this book begins with Lord Denning's characteristic remarks on judges and the nature of judicial power. It is followed by an essay by Dhavan which points to the absence of an adequate methodology by which we may evaluate judges and argues for a wider framework within which we may determine why, if at all, must judges be trusted. David Pannick, in his contribution, discusses the views of Lord Devlin and Ronald Dworkin on the discretion and degrees of freedom available to judges and their concomitant responsibility. John Bell explores the dividing line between "legal" and "political" issues and articulates three senses in which judges may be understood to "make" law. Justice Krishna Iyer's own career may be seen as exemplifying Bell's argument that there is no qualitative difference between the judicial and other roles in Government and the separation of the "legal" and "political" is artificial. This essay is followed by Neil MacCormick's contribution on the "Artificial Reason of the Law". He identifies the values that govern legal reasoning. Lord Scarman, in his contribution, discusses the significance of a Bill of Rights and indicates its potential for the formulation, application, and enforcement of basic human rights. Justice Krishna Iyer's judgments, of course, remain a testimony to the wisdom of Lord Scarman's argument. The contributions of Polyviou and Cox address more specific issues concerning the application of constitutional rights. J. A. G. Griffiths introduces a flavour of "class bias" in judges, while Alan Paterson provides an empirical account of how judges make decisions. Dhavan returns to the question of judicial accountability posed by Lord Denning at the beginning of this book.

The second part focuses on India. India's legal system is among the oldest in the world. In 1950 the new Constitution of India gave Indian judges the power to invalidate the actions of the Executive and Legislature if they are found to be unconstitutional. Both the nature and the exercise of this power have given rise to many controversies. Should judges decide matters according to "law"? Are there political dimensions to judicial power? If so, of what kind? With a penchant for 'purity' accompanied by an eye for the practical, Hindu jurisprudence engages with the problem of whether judges should decide according to 'law' and righteousness (*dharma*), or on the basis of policy and other socio-economic considerations. Derrett suggests that some of the contemporary controversies about these subjects bear similarities to some of the discussions of the *rishis* (sages) of ancient India.

Narain focuses on the problems of distributive justice facing the Indian judiciary, while Hardgrave and Galanter examine some of the problems of judicial decision-making in relation to affirmative action policies in India. George Gadbois provides a more complex analysis of the various ways in which judges can be described as political. Sudarshan presents the view that the judiciary is part of the apparatus of the State and argues that the 'relative autonomy' of judicial power must be appraised in the light of this fact. Upendra Baxi, more optimistically, essays the manner in which a new "social action litigation" has made the judiciary more sensitive to the problems of human suffering, poverty, and distributive justice. The book ends with K. M. Sharma taking us on a journey through the judicial universe of the man it honours.

This has not been an easy book to put together. As it is a *festschrift* for Justice Krishna Iyer we did not think it right to force on the contributors a preconceived structure. We have tried to place the various contributions as they were written in a thematic framework.

But for the energetic support of the publishers—Tripathi in India and Sweet & Maxwell in the U.K.—this book would never have appeared. The assistance of John Houghton, Margaret Cook and Angela Duncan has been invaluable. Thomas Paul at the Indian Law Institute and Anmol Vellani have contributed immensely by reading the proofs and preparing the index.

All those who helped this book happen have done so with affection and high regard for Justice Krishna Iyer.

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Part I

INTRODUCTION

1

JUDGES AND THE JUDICIAL POWER

LORD DENNING

This is a *festschrift* for Justice Krishna Iyer. But *festschrift* is not a word known to me. I suppose it means a collection of essays written as a tribute to the judge and his work. The essays are about *Judges and their Judicial Power*. So far as they deal with judges, I would say that judges are infinitely various. Some are wise, some not. Some are learned, some not. Some are talkative, some say little. Some interrupt, some do not. Some work hard, some are lazy. Some write judgments that are over-long, some are too brief. Some agree and have nothing to add, some dissent.

The Bar assess each one of the judges: but their assessment is fickle to a degree. If a judge decides in their favour, he is a good judge. If against them, he is a bad judge or he has an off day.

Even Francis Lord Bacon gave bad advice to judges. He declared that:

"It is a happy thing in a state when kings and state do often consult with judges: and again, when judges do often consult with the King and the State, the one when there is matter of law intervening in matters of State: the other when there is some consideration of State intervening in matter of law."

Putting those sentences in modern dress, Bacon was in favour of consultation between the executive government and the judges. So that if the executive government was in doubt whether they could lawfully take some step, the government should ask the judges about it: Or, if the judges were in doubt whether the law was in accord with public policy or not, the judges should ask the government about it.

That doctrine of Bacon is out of favour today. The judges must be independent of the executive. When I was the nominated judge for Pension Appeals, I was the final court. There was no appeal from me. One party thought I was too generous, the other thought I was too mean. But they dare not interfere with my decision. If there should be any quest of public policy, the judges must decide it on their own — without consulting any member of the government — for the government may have its own axe to grind.

So far as judicial power is concerned, it is a mistake to think of a judge as having power. He has jurisdiction to decide cases, but he has no power of his own. His only power is to decide according to law: and the law is to be found in the statutes or in the doctrines laid down by his predecessors over the years. In particular, no single judge has power of his own. In every appellate tribunal there are others to restrain him. I always say in fun: "When I was a judge of first instance sitting alone, I could and did do justice. But in the Court of Appeal of three, I find that the chances of doing justice are two to one against".

Judicial power rests on the combined wisdom of the judges. Their jurisdiction is more restrictive than creative. Their principal function is to restrain the abuse of power by others in the State. If the government does anything beyond its power, it acts *ultra vires*. Its action is void. It has no legal effect. If a company acts beyond its power, it can be restrained. So also with local authorities — or even trade unions.

So far as creative work is concerned, so far as active policy is concerned, there the judges have no hand. They cannot direct the government to spend money on this or that. They cannot do anything to help the poor or the unemployed. They cannot provide housing for the homeless. All social reform must be left to others. So must all political reform.

This is not to say that the judges are not concerned with social implications. Many of their decisions have political consequences. You will find that politicians of one party agree with a particular decision, and politicians of the other party disagree with it. One side or the other then accuse the judge of being political — quite unjustly. But, seeing that many decisions have social implications, it is as well that judges should be instructed on the likely consequences on society of this decision or that. The consequences may be good or bad economically. They may involve hardship on this or that section of the community. All this must be borne in mind.

In the end there is this problem before us. As the great historian Lord Acton said: "All power tends to corrupt. Total power corrupts absolutely". Who is to control the exercise of power? Only the judges. Some one must be trusted. Let it be the judges.

2

JUDGING THE JUDGES

RAJEEV DHAVAN

1

The absence of a critical framework

Even though judges exercise a considerable influence, the common law world has not really learnt to evaluate the work of the judiciary. The judges themselves do not indulge in self critique. Anxious to project themselves as 'neutral', judges tend either to efface their own importance or marginalise their significance.[1] Some judges claim to act on the basis of an intuitive understanding of the consensus values which society believes in.[2] Other judges offer the disclaimer that whatever judges may or may not be ". .. in the inevitable chemistry of social change, judges are certainly not anti-catalysts".[3] But, why not? Is it because they are judges? Or, is it because there is something inherent in the nature of the judicial power that prevents such socio-political subterfuge? The point merits further exploration since it has been given value added support by distinguished Marxist historians.[4] Here the hidden argument appears to be that judges must stay within their own self-described ideology in order to maintain support for their enterprise as a whole. Whatever be the 'truth' of the matter, there are great difficulties in adopting the following solution offered by a distinguished English judge :

> In the end there is this problem before us. . . . Who is to control the exercise of power? Only the judges. Some one must be trusted. Let it be the judges.[5]

We have never been able to assimilate our understanding of judges and the judicial power within a broader understanding of power and politics. Judges — and, no less, the politicians who espouse their significance — have always been able to plead their existence outside what is familiarly treated as the terrain of politics and power.[6] In order to delve more deeply, we need to examine how this state of affairs came into being. Having satisfied our historical curiosity we could then review the various methodologies by which the judiciary has — and, conceivably could be — studied.

II

The absence of a historical tradition

Courts are the legitimating arm of the semi-autocratic State and the pride of 'liberal' democracy. Classical political theory grounded in over-worked principles of separation of powers awards greater credibility to regimes which allow a judiciary 'independently' to adjudicate on the affairs of State. Not to have a judiciary which goes some way towards this overworked image characterizes the State in question as a non-democratic authoritarian regime.[7] In itself, this must indubitably pose a paradox. The defence of democracy is left in the hands of an elite; and, any attempt to relieve this elite of its custodial role is considered to offend 'liberal' democracy. This faith in the judiciary is justified on the *weak* principle that any reassessment of the exercise of power by State authorities by an independent institution must, perforce, be good. It is also justified on the *strong* principle that judges are concerned with providing an interpretative rectification which is, at least, concerned with commutative — if not distributive justice. That Marxists[8] have concerned themselves with a defence of the 'rule of (bourgeois) law' on the basis of moderating commutative role of judges against the tyrannies — both actual and potential — of the State, lends credibility to this justification!

Making 'law' or some version of 'justice' central to our understanding of the judiciary, overproposes the case for the judiciary without enriching our understanding of the judiciary in the context of a theory of power and State. It is impossible to understand the law of contempt without understanding the position of the judiciary in the overall context of the State and without some kind of understanding of the kind of 'power filter' the judiciary has become for emergent groups in a transforming political economy.

By itself very little of the law of contempt is really concerned with the 'efficient' execution of the court's powers. The law of civil contempt is concerned with obeying the orders of the courts. While the difference between civil and criminal contempt is conceptually thin, only a marginal part of the latter law of contempt is concerned with the court's powers to enforce law and order during the sessions of the court. The bulk of the law of contempt is not directly concerned with the efficiency of the law. Known as constructive contempt, this area of the law of contempt is concerned with notions of 'status', 'reputation', the institutional exclusivity of the judicial process and creating an aura around the judicial process. This development took place largely as a result of the growth of modern journalism and the advent of political attacks of the judiciary.[9]

Protecting the judiciary was by no means easy. It could not be protected on the principles of democracy because it was not by itself a democratic institution. It could not be protected for reasons of State because it was claimed that it occupied a semi-autonomous existence independent of the State. It could not be cloaked in official secrecy because its quest for legitimacy depended very greatly on the openness of its proceedings and the fact that it gave detailed and written reasons in support of its decisions. Its strength lay in the fact that it floated an ideology which obtained consent for what it was doing from the populace at large and from those who were the beneficiaries of the judicial process. But this consent was not bought and sold in the market place of democracy. It lay beyond and above. Democracy operates concepts like 'demand', 'expectations', 'want' and 'need' at one level and concepts like 'power', 'control' and 'authority' at another. To accommodate democracy, judges invented techniques of constitutional consecration whereby certain 'wants', 'powers' etc. were consecrated as law. The modern judiciary had little choice but to accept as an objective fact the 'laws' which were consecrated by political process. The whole jumble of constitutional law is devoted to disguising this simple fact. Critics of the Supreme Court of India during the Emergency (1975-77) attack the judiciary for its lack of subtlety in consecrating the detention laws of the Emergency.[10] Hedged in from all sides the modern judiciary is a very limited creature. It does not create much of the law it deliberates on. Nor does it have an extensive freedom to manufacture the equity with which the applicative use of law is moderated. Its quest for self-definition rests on very exaggerated claims of what it is able to do. Unlike the other organs of the State it cannot legitimate itself on the basis of democracy. Nor can it wholly create an illusion of affairs by appealing to 'justice'. It remains, however, a powerful arena in which many things can be re-negotiated and its litigative and lawyering processes lend themselves to much manipulation.

The law of contempt remains a weak attempt to retain a composition of illusions about the judiciary both as a corrective of the exercise of political power as well as an instrument of justice. Yet this attempt runs foul of other illusions which are a part of democratic expectations. The 'law of contempt' rests uncomfortably on the fact that its social and political objectives are to provide 'status' for an institution which is otherwise *sui generis;* it usually provides this status within the constraints of a democratic system which theoretically does not suffer such claims gladly. In order to achieve its objective, the law of contempt has to be quick and decisive; and to ensure that its exercise is not itself an occasion for controversy. For the law of contempt would be self defeating if its use excited the very controversies it was designed to exclude. If the law of contempt suffers criticism in its efforts to stifle criticism it suffers even more in its attempts to prevent an abuse of the contempt process. It uses a 'summary procedure'.[11] It does not allow truth as a defence. It does not readily allow the plea of a public interest. Such a 'law' is difficult to defend in a modern society in which a favourable ascribed status is not accorded to any process other than democracy. The American law of contempt has to be purged of many of the absolutist techniques which mar the English law.[12] The English law of contempt was itself radically altered by the Contempt of Courts Act 1981 so that it could be justified more easily on the basis of the ideologies of liberal democracy.[13]

The transformation of the law of contempt is bound up with the rise of the modern press. Zealous in its thirst for stories and anxious to represent political in-fighting in its most exacerbated form, the press of eighteenth and nineteenth century England acquired a capacity for publicising mischief on a scale that was unparalled.[13] At first the attempts to control the press failed. Prosecutions for sedition were used to give better publicity to seditious views.[14] Taxes designed to liquidate the smaller 'radical' papers hit the larger 'responsible' papers with greater force than they diminished the circulation of the 'mischievous' press.[15] It was not until the smaller newspapers faced the full impact of the economies and a competition of the 'free market' that the captive audience they commanded diminished.[16]

The modern press troubled politicians and judges in equal measure. Whilst the political elite used various political and economic methods to control the press, the judiciary transformed the law of contempt to meet the new challenge. Before the eighteenth century, constructive contempts were not dealt with summarily. It was the Wilkes controversy that occasioned Chief Justice Wilmot's creating, in 1765, a summary procedure which forms the basis of 'new' law of contempt.[17] The effect of this procedure was to make the judiciary judge its own cause by summary procedure under circumstances which allowed virtually no defences against an absolute liability occasioned by even the slightest interference with — or usurpation of — the administration of justice. Chief Justice Wilmot's judgment was never delivered. Published by his son as part of his papers, it was severely criticised by an Irish Judge in 1813[18] but interpreted in 1821,[19] as having authoritatively laid down the law. By that time, an opinion had clearly become a *fait accompli*. Meanwhile in the *St James Evening Post* case (1742)[20] justified the gagging of the press, during and after the pendency of court hearings:

> Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard.

Having established the law of contempt on a firm footing, the law was explicated in various encounters between the press and judiciary. If a strong Chief Justice had nice things to say about the forbearance of press in 1874,[21] his colleagues and successors were less complimentary about ". . . modern journalism with its ceaseless thirst for matters which interest its readers."[22] Judges virtually ceased to use the common law offence of "perversion or obstruction of the course of public justice".[23] Instead, they relied on the law of contempt with its summary and expeditious procedures.

The reaction of the judiciary strategised into two distinct directions. The *first* was to control the kind of criticism that could be mounted against the judiciary. While the law made it plain that judges were not to be severely criticised so that others may think less of the judges, the judges were clearly embarrassed by this crude method of protecting their own reputation.[24] This embarrassment continued till at least the end of century when judges in Privy Council ruled that the offence of scandalizing the judges was 'obsolete' in Britain but was needed "in small colonies consisting principally of coloured population(s)".[25] But even this admission was overturned in a decision of an English Court in 1900[26] to the effect that those who lowered the reputation of judges by 'scandalizing' them would still be subjected to power of contempt. In times of social and political crisis, this aspect of the power of contempt has invariably been revived. Thus, in the inter-war years, it was used against those who described a judge as a 'bewigged puppet who exercised a class bias.'[27]

It was also used against a newspaper which asserted that a former Attorney General who had piloted a piece of legislation could not later as a judge give a fair hearing to cases arising under that legislation[27a] Lord Atkin in 1936[28] and Lord Denning in 1968[29] seemed to want to liberalise the attitude of the judiciary. But there has never been any question of giving up this power altogether.[30] The truth of the matter is that, although sparingly used, the law of contempt of court has provided the disciplinary framework in which possible criticism of the judiciary is conceived and formulated. Critics are put on the defensive. In high sounding and impressive rhetoric, potential critics are not just told of the severity of the law of contempt but also publicly shamed by the exhortation that it is in the wider interests of society and justice that the judges should not be subjected to the kind of criticism which would lower their status.[31] This had, and continued to have, a very powerful influence on legal, social and political criticism, about the judiciary and its work. No pressmen dare to unearth stories about the judges. Academic criticism tends to confine itself to technical and 'legal' matters without reference to contextual evaluation. The restraining influence shadow of this 'black letter' tradition has been quite considerable. The pages of the *Law Quarterly Review* record at least one instance of a distinguished academic being ticked off by one of his peers for being too critical of the judges even within the black letter tradition.[32]

Apart from containing critiques of the judiciary within the 'black letter' tradition, the second strategy of the judiciary was to congeal its work into an exclusive autonomy. This, in effect, meant that no one could really comment on a case when proceedings had been commenced or were imminent.[33] This did not mean that factual information about the case could not be given in the press. The press could report the legal facts but could not socially evaluate them. Unfortunately, the tussle between the judiciary and the press in this area is inevitably recounted in the judiciary's favour by reference to sensational murder stories where the press had over-reached itself into exaggeration.[34] But the overall effect of the law was not just to tone down sensational reporting but to stifle any kinds of critical and evaluative comments on the merits of a case or how it proceeded through the judicial process. Courts were treated as areas of exclusive autonomy. Their work — and the issues that came before them — were de-politicised even though significant social, economic and political issues were determined by judges in court. As long as courts were seized of an issue, they remained immune from evaluative discussion. Several cases in the 1950s affirmed that the law was so severe that it punished the inadvertent journalist[35] and the innocent distributor[36] to the same extent as the motivated contemnor. Those who commented on a case could be punished for contempt of court even though it was established in later proceedings that the impugned publication did not, in fact, adversely affect the course of the trial.[37] It was not till 1973 that judges on the House of Lords admitted that the test that the course of justice must not be adversely affected was too ambiguous and too restrictive.[38] Apart from instances where there was direct interference in the administration, a new test was put forward that commentators could not usurp the functions of the court by pre-judging the issue. In other words, the social and political monopoly of courts to determine questions belonged exclusively to the courts. This particular case dealt with the *Sunday Times* espousing the cause of the ill-fated Thalidomide children's quest for compensation from wealthy drug companies. The European Court of Justice found this 'pre-judgment' test contrary to the freedom of speech provisions of the European Convention of Human Rights.[39] The effect of making the courts exclusive and autonomous was that courts were not treated as arenas of social, political and ideological conflict. No tradition was established to contextualise the work of the courts within framework of power, conflict and social interaction and strife. Instead, a counter tradition was established to leave the courts alone. So, the courts have continually exercised a considerable *decisional* and *ideological* influence without being subjected to careful and considered scrutiny.

Although we have, in the main, dealt with examples drawn from the English judiciary, the tendency to stifle criticism and contain social and political evaluation is part of the common law tradition. The 'law' is projected as constituting its own reality. Accordingly, judges and their courts are to be judged in the light of a narrowly defined concept of 'law'. This tradition was questioned in America in various ways. Over the past few decades, American courts relaxed the law of contempt to permit both criticism of the judiciary as well as allow a considerable measure of comment on the judicial process.[40] Academically, the work of the courts was subjected to empirical research. This was first manifest in the work of the Realists who can be not unjustly identified as a dis-related group of idiosyncratic teachers and researchers.[41] While they stimulated initiatives to collect information about how the courts work, they were not able to provide the systematic exposition needed to gather their initiative together. Subsequent studies of the judiciary have continued their search for a proper methodology within which judges and their institutions can be studied.

III

The absence of a convincing methodology

In one of his savage attempts at oversimplification, Bentham sought to dream away the problem of judicial discretion by arguing out a case for discretionless rules.[42] In this, as in many other matters Bentham displayed a characteristic lack of understanding about law, its purpose and how it worked. Self absorbed by his own attack on Blackstone[43] and obsessed with the objective that English law was haphazardly organised nonsense, he failed to examine and evaluate contemporary law and legal institutions. Like Austin, he argued the case for normative clarity in the hope that this simple ingenious solution would be elegantly translated into pathological reality. While it is useful to have clear "instructions" (i.e. laws) from legislatures which act on sound legislative principles, such clarity does not obviate the necessity of examining the true nature of judicial discretion or analysing the institution in which such discretion is housed. Nor does the argument become more convincing when an alternative explanatory hypothesis is espoused to the effect that judges have no discretion as such because they decide everything on principle.

Modern jurisprudence has not really evolved a proper methodology to study judges and the judicial power. In a cumulatively sophisticated attempt to tone down the importance of the judicial power, two aspects of the judicial function have been presented as representative of the judicial function. The first — which can be traced back to at least Hale and Blackstone — is that judges merely find and declare the law rather than create it.[44] Thus, judges are, allegedly not a source of law. This splendid 'fiction' applies equally to the common law and statute. Not surprisingly, principles of statutory interpretation struggle with the notion that judges merely interpret statutes.[45] At the same time, within the reasoning of the law, the common law is not an excuse for inventing the law but a declaration of what was already there. This point has been stressed more forcefully in modern times with at least one judge declaring that the common law "cannot abrogate an existing principle of law and I doubt whether it is now ever likely to invent a complete new one".[46] The second aspect of judicial juristic techniques that receives much publicised attention is the doctrine of precedent. To the image of the 'safe' judge is added another significant dimension. The 'ideal type' judge is consistent. This consistency is not just a lateral consistency whereby similar cases at any one point of time are decided similarly. The consistency has linear dimensions in time. There is — at least so the argument runs — a historical consistency in that judges do not really deviate from their previous decisions.[47] Since such a policy, if taken to its limits, could lead to silly and unjust results, judges have taken to asserting the freedom to deviate from previous decisions in given cases.[48] Yet the picture that is created by an emphasis of these twin aspects of judicial decision making (i.e., non-creativity and consistency) remains elegant, inspiring and reassuring. Our attempt, here, is not to argue the falsity or truth of the reality behind the facade that these twin projections about the judiciary create. Our concern is to draw together the images that judicial doctrine seeks to create and re-inforce. For the argument, at this stage, is about the socio-political image which is attached to the judicial function. This image helps to lay down the criteria and methodology by which the judicial function is assessed. The assessment of judges begins to reflect the same concerns that judges claim guides their judicial decision-making. If judges are upholders of the law according to consistent doctrine, the criterion for judging the judges comes to revolve around the nature of the law and the manner in which settled doctrine reifies the law. This is the 'black letter law' tradition which has dominated law schools for many decades and is writ large in the pages of so many law journals.[49]

The 'black letter law' tradition was reinforced in a large number of ways and for a large number of reasons. The rise of analytical jurisprudence helped to earmark the law as a distinct field.[50] Not to be confused as a branch of ethics, law stood mysteriously self contained even though it revelled in morality and was inextricably bound up with life and social processes. The effect of this approach was to identify the following characteristics:

(a) Law is distinct and autonomous.
(b) Law consists of rules as well as practice.
(c) The practice is assimilated in concepts and doctrine.
(d) The practice provides methods which produce an internally derived dynamic adaptiveness in the law without compromising doctrinal consistency.
(e) A failure in the internal processes of dynamic adaptiveness can be externally corrected by designated law creation agencies. The new law, thus created, would itself be doctrinally absorbed in the law.[51]

In all this judges are not profiled. They are the custodians of law and doctrine. There is still room for the great judge and for, what Llewellyn called, the 'grand style'. For the 'black letter law' tradition is not a narrow tradition concerned with the letter of the law. It is a much wider 'black letter law' tradition which encompasses the doctrinal basis of practice. Thus, while a distinguished writer is anxious not to deprive certain Victorian judges of "greatness",[52] their claim to such fame depends on their doctrinal vigour. No further questions about them or their work are deemed necessary. And, if there are no 'great judges' — as is sometimes alleged about our most contemporary society — it is assumed that "law (has) suffered a menopause".[53]

While the emphasis on doctrine continues and has, more recently, been analysed as a species of ethical argument, the purpose and function of law is shadowed into obscurity with this preponderance of doctrine. Exuding an appearance of esoteric sophistication, doctrine simultaneously provides autonomy, isolation and power. Her Majesty, the Queen, reflected all these aspects when she pronounced on the judicial predicament:

> As the independent custodians of the law, the judges bear a direct and personal burden of responsibility which make their office a lonely and difficult one. We are fortunate that our judges are worthy inheritors of the great tradition of their predecessors.[54]

The 'black letter law' tradition continues to be espoused and defended in splendid rhetoric.

It is inevitable that all kinds of concerns prompted the quest for new methods to study judges and the judicial power. In the Anglo-American tradition a folklore significance is attached to Justice Holmes' bold remarks that 'what judges do is in fact what is meant by the law'.[55] Ambiguous in itself, such a remark could, and indeed was, taken to call for more scrutiny of work of judges within the conspectus of the black letter tradition. All that this did was to provoke assertions and confessions to the effect that judges did, in fact, create 'law'.[56] Little attention was devoted to asking and answering the questions: Why? And to what end?

Roscoe Pound's early strictures on the judiciary held out some hope for the creation of a fresh methodology. Here was a solid exposure of the work of the judges,[57] of the 'mechanical (nature of their) jurisprudence' of 'the decadence of their equity'[58] of the misuse of the doctrine of 'liberty of contract',[59] of the vast gulf between 'law in books and law in action',[60] and of the need for a new 'sociological jurisprudence'.[61] Even if we now look back on "the golden age of Roscoe Pound"[62] it is difficult to accept the view that he provided 'not just flashes of insight but sustained illuminations'.[63] Having answered the question "do we need a philosophy of law"[64] in the affirmative, Pound felt the future lay in improved doctrine emanating from law schools. Later, in his analysis of judicial decision-making, Pound argued a brief for certainty in matters relating to property and contract.[65] Ultimately, his contribution lies fairly and squarely within the 'black letter law tradition', i.e., the creation of a new scheme of doctrine for the socially minded judge who wanted to pledge differential and competing interests on an enduring and consistent basis. Although much can be made of the quarrel between Pound and the Realists,[66] Llewellyn's celebrated reply to Pound does not suggest that the Realists had really articulated a new methodology.[67] Many of the realists affirmed the importance of 'black letter law' tradition and the central role of the juristic techniques used by judges. Llewellyn's exploration of the 'common law tradition' highlights the importance of the 'black letter law' while at the same time applauding the inventive resourcefulness of judges in the 'grand tradition'.[68] While interested in other social science methods — as evinced in the study of dispute settlement amongst the Cheyenne[69] — Llewellyn hovered nervously on the edge of an incomplete breakthrough into new methods of studying the judiciary.[70] Other Realists were keen to study what happened 'out there'.[71] This was a significant departure from the study of rules and doctrine. But, at the same time, much of this work is cast in a descriptive mould. The 'out there' seemed to be a world of court centered facts which seemed to tell their own significant but unstructured story. If the Realists can be associated with the rise of the descriptive method of studying judges and courts, their disorderly eclipse seems to warrant the judgment that the descriptive method was never really enough and disguised a plethora of undeclared pre-suppositions and purposes.

If the Realists can be retrospectively — and not wholly accurately — described as the 'early empiricists', they can be used as a marker to identify later empiricists who were much more rigorous and explicit about their research aims. The connection between the 'early day' empiricists and their allegedly latter day counterparts is tenuous.[72] One branch of this latter day empirical research concerned itself with the internal dynamic amongst judges. Writers like C. H. Pritchett began to evaluate American constitutional law in terms of the contributions of individual judges shadowed against their internal group dynamic.[73] This was only one step away from the new science of 'jurimetrics' which 'scaled' the contributions of each judge in relation to his colleagues and predicted his position on particular issues.[74] To the extent that this approach was based on gross data analysis the approach was consequentialist, looking only at results and ignoring the values and techniques through which the results were justified. To the extent to which judges were pitted against an ideological scale, primacy was given to the role of the judge (as distinguished from other elements in the litigation process) which was judged according to subjective 'scale criteria' virtually invented by the researcher. This branch of latter day empiricists exhausted the limits of their methodology when they hit the 'jackpot' with such truths as: 'judges are inconsistent', 'judges are influenced by the colleagues they sit with', 'some elements of judicial decision-making can be predicted' and so on.[75]

The more meaningful research into judicial decision-making has taken place in the hands of a disperate group of people who can be called the neo-empiricists. The neo-empiricists are a mixed bunch of people.[76] Many of them — like the Realists — have very little in common. They use different methods and work in different areas. They concentrate on different aspects of the judicial and litigation process. The neo-empiricists enjoy one common ground. They are not just concerned with judges and the personality and inputs of individual judges. Their subject area of study is the judiciary as an institution or as part of a social process. They differ very greatly in their understanding of the kind of institution or process which is being studied. Yet they claim to be empiricists because they claim to want to 'find the facts'[77] even though this quest for facts often disguises — sometimes even to themselves — their own agendas about which institutions should be used and reformed; and, if so, on what basis.

The neo-empiricists look at the judiciary and seek to analyse the working of the institution in terms of its purpose, function, pathological — often disfunctional — use and the context of the litigation process of which adjudication is a part.[78]

The work of the neo-empiricists needs to be distinguished from what can be called 'managerial' analysis. The purpose behind 'managerial' analysis is to pick out one particular court or courts or processes — and examine the manner in which courts arrange their affairs in order to deal with the work that makes its way into their docket.[79] Even if some of data collection is relatively simple, an examination of courts as institutions is a very complex affair. To begin with we need some kind of measurement of the work flow. Work flow is judged according to the manner in which the work is disposed of. Quite often there are considerable delays. The problem of delay is inextricably wound up with more substantive questions asserting that justice delayed is justice denied. There is a vast and quite considerable literature on 'delays' in courts. This is a matter which concerns policy-makers.[80] In some countries, the delay in disposing cases has reached the same Dickensian proportion as were characteristic of Chancery courts in the early part of the nineteenth century. Such extremities call for policy initiatives supported by an empirical examination of the measure of the problem. The managerial approach is immediately pushed in the direction of problem solving. Discussions about work flow are connected to discussions about finance, resources, management methods and technology.[81] The managerial approach is circumscribed by the important limitation that it seeks to solve problems within the institution in the context of the institution as it exists at that point of time. No attempt is made to try and find out why the problems arise as a result of societal variables located outside the immediate and formal working of these institutions. At the same time, little effort is devoted to differentiating between different kinds of users.

Beyond such 'managerial' approaches lies the work of the neo-empiricists. The neo-empiricists begin with neither the normative premises of analytical jurisprudence nor the institutional starting point of managerial studies. They claim to draw inspiration from sociology and have marked out a field called 'sociology of law'. While there is a considerable amount of disputation about the exact contours of sociology of law and how it can be distinguished from the 'rule/discretion' model of analytical jurisprudence or a law in context approach (which explains the rules in their 'before and after' context), it is not necessary to explore those controversies here. What is significant is the fact that the sociological neo-empiricists do not give central importance to, or ascribe a kind of primeval pivotal role, to the black letter rules and formal institutions which are so central to the methodology of analytical jurisprudence or managerial studies.[82] A celebrated article outlines how different the real world of law outside these rules really is, and how peripheral the rules can be to the working and functioning of this real world. What then is the status of the rules? The rules themselves are treated as 'bargaining counters'[83] — sometimes very significant; and sometimes not capable of carrying any of the significance which is nationally attached to their status. Much of 'real law' consists of 'bargaining in the shadow of the rules'.[84] But the fact that the rules cast a shadow does not make them central. They are one variable — although an important one — in a complex socio-legal process. In this newly chartered sociology of law, modern law is not defined by reference to some abstruse 'rule of recognition' through which officials identify and apply rules. Much rather it consists of a cluster of institutions, professions, practices and normative declarations which often struggle for — but do not always achieve — unity.

Although the neo-empiricists use a whole range of sociological methods, they shy away from a particular kind of sociological approach which analyses social reality purely in terms of models of professional behaviour, the function of institutions and models of interaction. While deriving considerable sustenance from anthropological research into dispute settlement, neo-empiricism distinguishes very sharply between technologically simple societies and modern technologically complex societies.[85] The neo-empiricists concentrate on the various normative frameworks of modern law, its institutions, processes and professional clusters.[86] Having done that a theoretical attempt is made to describe what exists. A typical example of this approach is Galanter's oft quoted work and seminal article on 'Why the haves come out ahead. . . '.[87] Galanter evolves a typology of disputants on the basis of their institutional skills and capacities to play the litigation game. Accordingly, there are 'repeat players' and 'one shotters'. On the basis of this typology, a whole series of policy initiatives are planned which try and give to the 'have nots' the skills which are possessed by the 'haves'. A much more ambitious project is the Civil Disputes Research Project which examines the manner in which modern civil disputes go through the process of 'naming, blaming and claiming'.[88] Such research has the effect of diverting attention away from court centered adjudication to arenas of bargaining and negotiation. Most — if not all — claims are allegedly lost and won through bargaining and negotiation at preliminary stages of dispute resolution. This, then, is earmarked as the stuff on which real law is made of. The neo-empiricists claim that this field is marked out as a result of empirical observation and theoretical reasoning on the basis of such empirical work. That the theory precedes the empiricism is a matter for later comment.

The neo-empirical approach also seeks to re-examine the standard model of analysis to litigation and judicial decision making. Adjudication is not just seen as a court centered activity.[89] Instead the work of courts is set in, what has been described as, the 'wider landscape of disputes'. Once this is done, alarmists who say that there are docket explosions in courts are quelled by reference to the existence of excess capacity in other parts of the landscape to absorb and settle disputes.[90] This is a bit like Say's law of market in economics. The supply is absorbed in the long run. But, as Keynes, remarked : in the long run we shall all be dead. Thus, it has been argued that there are, in fact, no elegant landscapes. What exists is a very rugged terrain which is purposively designed to treat different kinds of users differentially.[91] Nor is it right to invent a continuum of dispute resolution and assume transitivity from one part of the continuum to another. Elegant emprícism seems to hide more than it reveals. Its refusal to look at 'law' and dispute resolution in the wider context of the political economy over-simplifies certain parts of its understanding with an indulgent optimism.

Neo-empirical studies have also re-structured the familiar models through which we study the judiciary. There is a traditional 'triadic' model — familiar to students of the adversarial process — which places the judge as the neutral apex of a litigation triangle dispensing justice according to law between litigants. The neo-empiricists argue that this triadic model is rhetorical and does not correspond with reality.[92] The judge is not the neutral apex of the triad. He is a participating third party which is constantly bargaining, negotiating and adjudicating. At times, he crusades a point of view. At other times, he seeks to settle the issue. According to this approach, studies of judges and the judicial power should seek to examine the multifarious stances taken by judges rather than concentrate on just the adjudicating function in order to explain how they intervene or avoid intervening in a dispute.[93] This approach does not, however, explain whom the judge is negotiating for and to what end. It overlooks the fact that the judge is part of the State and represents the intervention of the State in any particular dispute.

While the neo-empiricists' emphasis on fact finding is salutary, there are some serious flaws in their approach. 'Facts do not exist in a vacuum unsupported by explanatory theoretical explanation. The neo-empiricists do not sufficiently articulate their theory of power or their theory of State. Much of neo-empirical theory cannot be dissociated from the context of America in which much of the work of the neo-empiricists is set. The first major assumption of the neo-empiricists is the assumption that all human society has a liberal elasticity to it. Thus, Galanter's arguments — while purporting to be descriptive rather than prescriptive — warrant the optimistic thought that the 'have nots' can also come out ahead if they manage to acquire the right kind of institutional and other skills.[94] This underlying assumption is part of the declared American dream that in a liberal society anyone can succeed if they can cumulate the requisite knowledge and expertise. While this makes sense as rhetoric, it is a misleading evaluation of the political economy of most, if not all, modern societies. Again, the 'reading of the landscape of disputes' does not do justice to the manner in which power is allocated in a modern capitalist economy.[95] The supposed existence of avenues through which countervailing power can theoretically be articulated and exercised does not accurately reflect the actual conditions of political economy which, in turn, mould these avenues to advance, stultify or retard specific causes in certain directions. This is not to suggest that there is no flexibility in the system but merely to emphasise the unrealistic nature of an analysis which proposes that power balances within a particular society can be disbalanced by the concerted acquisition and use of certain specialist skills. Society does not present so many 'turn around' solutions for the disadvantaged as American liberalism (disguised as neo-empiricism) would have us believe.[96] The second major problem with neo-empirical theory is its concept of State. In neo-empirical theory, the State is no more than a mediator between the various interests that compete for attention and priority. It is readily assumed that the State is just another institution which can be remoulded by skilful use. While it is true that the State in late capitalism has sprawled into gigantic proportions and multifarious activities, it is not characterised by the 'open endedness' that American liberalism attributes to it. As an act of necessity, the State must delegate a large amount of power and responsibility to all kinds of functionaries. As a fulfilment of the often contradictory promises of liberty, equality and justice for all, the various agencies of the State may be hoisted on their own petard. As a matter of pathological reality, many of the centralised initiatives of the State may suffer from entropy. At the same time, the State may still successfully fashion processes and disseminate an ideology which endeavours to maintain a particular power structure. Those favoured by the State may not win all the time; but they would win most of the time. And that is saying much more than most liberal theories are willing to accept. Neo-empiricism seems to reinforce much of American liberalism while not paying enough attention to the forces of political economy that mould society. At the hands of the neo-empiricists both law and the judicial power, sub-silentio, promise much more than they can realistically be expected to deliver.

Not surprisingly, a radically different approach to the judicial power concentrates on aspects of the political economy. Let us begin with common place argument which identifies judges with their social and political connections and argues that judicial power serves these social and political connections much in the same way as any power might be expected to be. Such an argument is eloquently expressed in an English contempt case which described a particular judge as a 'bewigged puppet'[97] who exercised a strong class bias. A celebrated contempt case from India places this class bias argument within a crude Marxist context.[98] A Marxist politician of long standing not only argued that judges were class biased but also that it was inevitable that they should be. This analysis was found to be in contempt of the judiciary. Not content to use its extraordinary contempt powers, the Supreme Court decided to prove that the erring politician was not just wrong about the judiciary but also about its

Marxism. During argument the court had been taunted by counsel that it had learnt its Marxism from the works of Middleton Murray.[99] The court responded with a triumphant — even if half baked — exposition of Marxism, adding that it would reduce the contemnor's fine because it had corrected his lack of theoretical understanding.[100] This made at least one magazine declare that if people were going to have their punishment reduced each time the court exposed their lack of understanding of Marxism, the queue of offenders seeking a diminution in their sentences would be extraordinarily long.[101] Some academics have tried to build on this 'class bias' argument in India as well as England. The Indian discussion has proceeded more at the level of assertion rather than analysis.[101a] In a sense this is also true of Griffiths' more celebrated. *The Politics of the Judiciary.*[102] The methodology used in the latter book consists of no more than showing that judges shared common social traits with a particular class (e.g., went to similar schools, clubs, etc.) and could be shown to have favoured that class if a consequentialist analysis (i.e., looking only to the results achieved), were made of their decisions. Such an approach ignores a large number of quotidian pressures on judges and the judiciary as an institution, neglects the fact that judges are not just decision makers but also conceptive ideologists and seems to take a very crude view of how one group or class exercises power over another.

Another way of pursuing the same kind of analysis lies in using the concept of interest rather than class in explaining judicial decision making. The idea that society is divided into — and seeks to pursue the cause of — several kinds of identifiable individual, social and public interests can trace its popularity to nineteenth century political theory even if its pedigree stretches back into antiquity. Jhering's *Der Zweck in Recht* certainly influenced Roscoe Pound's earlier analysis of the work of the judiciary and ultimately found expression in his eclectic 'interest oriented model sociological jurisprudence'.[103] At the same time, late nineteenth century American social thought was independently analysing contemporary society in terms of the economic and other interests. In law, this approach was most clearly expressed in Charles Beard's *Economic Interpretation of the Constitution.*[104] Unfortunately, 'interest' theory used the same kind of consequentialist arguments which characterised the analysis based on class. The consequentialism is evaluated as an overview rather than after a detailed consideration of what was actually happening and why.

In later years, this general overview approach was replaced by a much more rigorous history. We may be reluctant to accept the over-sanguine picture painted by some American legal historians that law actually managed to package together the set of beliefs which most Americans wanted even if it did serve the more specific interests of some.[105] While such learning draws together a considerable amount of social analysis in its understanding of law, it does not give all the aspects political economy the detailed and studied attention it deserves. Nor does it sufficiently identify the dynamic and structural components of the political economy. This is also true of Horowitz's remarkable *Transformation of American Law*[106] which does much to demolish the reified romanticism which American law projects. By concentrating on private rather than public law, it shows how the law was instrumentally fashioned and then formalised and consolidated into a position favourable to some over others. Much more detailed attention needs to be paid to the relationship between courts and other State agencies, the changing nature of the litigation process, and the nature of law both as an ideological and institutional mechanism as well as an instrument of a very complex State in an equal complex political economy.

A well-profiled initiative about an alternative approach to 'law' and the judiciary came from what have been called 'arguments within Marxism'.[107] Embarrassment by some of over-deterministic implications of crude Marxism, writers like E. P. Thompson reject the view that the rule of law must represent the rule of a class. This was not just to assert that the 'law' was a sophisticated method of control. Much rather, it was to make the point that the 'law' and the 'rule of law' acquire an autonomy of their own — self constituting in its integrity and influential in its impact on the manner in which society and the State dispense oppression. Several serious propositions about 'law' and history lurk behind the relatively simple assertion that 'law' is not all bad but may contain some good. Apart from the relative autonomy attributed to the law and its effect on the social relations, an emphasis was placed on the importance and effect of ideology on a society

> The rulers were in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric: they played the games of power according to the rules that suited them, but they could not break those rules or the whole game would be thrown away. And finally, so far from the rule shrugging of this rhetoric as a hypocrisy, some part of it at least was taken over as part of the rhetoric of the plebian crowd, of the 'free born Englishman' with his inviolable privacy, his habeas corpus, his equality before the law.[108]

E. P. Thompson draws his case study from the application of the Black Act whilst Douglas Hay has studied poaching in on Cannock Chase.[109] In each study it is clear the intervention of the law and that of the judiciary mitigated the potential rigours of the 'law' and legislation. All this is very interesting history and establishes the 'double edged' nature of law. But how sharp is the other edge? How relative is "law's autonomy"? And how influential will the 'law' and the 'judiciary' be in re-negotiating and re-determining the relative balance of the various material and non-material forces that are given expression to by society? Since the 'rule of law' and the values it conjures up are largely rhetorical, one cannot assume a static content. The 'law' contains a considerable internal adaptiveness to re-assert its espousal of a particular balance of social forces in society. So, the broad argument about the rule of law does no more than affirm long cherished values held by political conservatism. The cut and thrust of the 'rule of law' deserves more detailed treatment. It is relatively easier to accept what has been called the regression thesis: the 'law' does draw together a set of values below which a society cannot go without suffering acute embarrassment.[110] The blinding of prisoners in Bihar and virginity tests of immigrant fiances at Heathrow airport are both examples of such regression. Reactions to these incidents are typical of society's outrage to such acts of regression. But, it is difficult to go further and claim greater potential social and economic dividends for the disadvantage from the rule of law. The 'rule of law' — and the values it assimilates — may bring with it a corrective justice of marginal significance. It cannot, without more, be the instrument of distributive justice. For there is more to law than simply fulfilling its own rhetoric. While it is true that a coming together of social forces may use this rhetoric. Such rhetoric may be the rallying point for this coming together. But any effort at social explanation must look to these social forces to discover what is happening without making exaggerated claims about the rhetoric which must, inevitably, be intertwined with more material needs in the social expression of any movement. This is the crucial failure in the approach of an Indian legal academic who counselled the Supreme Court of India to evolve a 'populist' justice to favour the disadvantaged.[111] He completely ignored the social forces that would have sustained such a jurisprudence. And, if the Supreme Court was going to provide a lead, with whom, for how long and in what direction?

The assertion that too much has been claimed for the 'rule of law' and its curative powers should not be taken as a rejection of the importance of ideology in society and social analysis. The real difficulty arises when 'ideology' is represented as a variable in itself occupying an independent existence and independent effect. 'Ideology' is, after all, just a term isolated by writers to make communication and understanding easier amongst themselves. It is part and parcel of social forces. The more we eulogize its separateness, the more we mis-conceive the relationship between thought and action and between material forces and their expression. There is no such thing as a material force pure and simple. All social forces have to be cognised and expressed. The manner of their cognition and constitution and the social acceptability and appeal of the way in which they are expressed is a complex, intertwined and composite mosaic which is ill-served by a dichotomous disaggregation into ideology and material elements. 'Law' — as a subject area — contains an uneven mix of all these elements. It cognises and constitutes material forces in a particular framework and is constantly subjected to a recognition and re-constitution. In its struggle for consistency, this process is often laboured; and, also, often deliberately blurred and fudged.

IV

The presence of an alternative

Assessing the work of judges and the judicial power has been over-shadowed by the dominance of the appeal court tradition. Appeal courts have a high profile existence and publicly express their deliberations in an esoteric language and style of reasoning. They articulate values which are either axiomatic in their truth value or generally supported by some kind of consensus in society. While we are right to de-mystify the consensus and look behind the mask of legal reasoning,[112] that, by itself, does not obviate the need to try and understand judicial institutions and the context in which they work more clearly.

To begin with, it is not helpful to follow the lead provided by anthropological theory in conflating a study of the judiciary with the general study of dispute settlement.[113] The judiciary is part of the machinery of State. The higher we climb in the echelons of the judiciary the closer we are to an important part of the constitutional nerve centre of the State. While it is important to locate the judiciary in the State, it is possible to show that many 'informal dispute settlement' processes are also State-managed or at least influenced by the purposes and forces which infect the State.[114] Since the modern State sprawls purposively and informally in many directions, the distinction between designated State institutions and non-designated processes influenced, controlled or tolerated by the State is not always exact. Nevertheless, those institutions which are part of the State are distinguishable, from those which are not, in a large variety of ways. They are subjected to a different apparatus of control. They share the mark of officialdom. They are committed to acting in a particular way. Amidst innumerable tensions from within themselves, State institutions share, in some measure, the same or a similar commonality of purposes and aims. Even if certain areas are made 'independent', made (relatively) autonomous or decontrolled, they are still part of a State. The extent to which the State is cohesive and whether it is purposive or eclectic depends on the political economy and those within it who use and manipulate the State. An emergent capitalist creates contradictions and fissures which those in power seek to congeal.

But although the judiciary is a part of the State it is a hybrid State institution. A large part of it lies submerged in the private market economy of lawyers and lawyering. Access to the judiciary is not controlled by judges and the law but by lawyers and the private market economy which revolves around their work. It is lawyers who settle the large number of issues before they can be presented in court. It is in the chambers of lawyers that many of the creative conceptive advancements of law are fashioned. But lawyers are more than just a preliminary stage to the final (judicial) process. They are part and parcel of the whole institution of the judiciary. In fact, in more senses than one, it is the lawyers who run the institution whilst many of the judges are 'necessarily out of touch'.[115]

The private market economy in which law and legal institutions in the common law world are inextricably enmeshed gives various social forces a kind of dual control of this part of the State. One part of this control lies through the other agencies of the State which use various direct and indirect methods of control over the judiciary. The other part of the control lies in controlling access to law, lawyers and legal processes. The other agencies of the State control the judiciary in various ways. In the modern State much of the 'law' that is to be transformed and interpreted by the lawyering and judicial process emanates from the legislature and administration. [116] Even if such 'law' is just a bargaining counter, it, nevertheless, may — and does — exercise a decisive influence on legal processes. The other agencies of the State exercise a great amount of influence over the system of patronage by which judges and other officials of the court system are appointed. In this process, the forces of the 'private market economy of law' which forms a major recruitment ground, also plays a significant role.[117] The State also controls the manner in which the judiciary is funded. The judiciary is, as it stands, 'the least expensive branch' of the State.[118] Apart from explicit control mechanisms there is a considerable degree of understanding within which the judiciary is expected to operate. A violation of this understanding could lead to the packing of the court (as in the New Deal crisis in America), the passing of remedial legislation or various campaigns to discredit the judiciary into compliance. There is a huge insufficiently explored area of research here which has not been explored in any meaningful sense by the large number of political scientists who are interested in the work of the judiciary. But this is only one aspect of control over the judiciary and the judicial processes. The private market economy of law, which in a reactive adversarial legal system, acquires monopolistic control over access to judicial processes, determines what issues should be examined and how they must be evaluated and determined. Here again, there is a considerable amount of play in the processes but it is circumscribed by an implicit understanding of the contours of the permissible. In fact the process is a social and economic process which blends pragmatism with a commitment to maintain some consistency in respect of its methods and values.

Those who interpret this private market economy often exaggerate the autonomy of the lawyer professionals who operate it. Lawyers, like other professionals, are said to be repositaries of a self controlled power.[119] Such a theory exaggerates the isolation of the lawyers and under-estimates the systemic control of the processes of law. Professionals are tolerated not as a matter of resignation (i.e., they have acquired a lot of power and nothing can be done about it) but because professionalism connotes a certain predicability of form and action. Thus, professionalism — in most instances — fulfils the expectations of those in power by creating the disciplinary framework within which all those who wish to use certain processes must act.[120] It is important not just to know how this process works but who uses it and to what effect.

To the extent to which law is a series of processes and institutions, it is an interesting 'power filter' through which social and economic forces must articulate themselves in order to receive formal legitimacy and recognition. These institutions are carefully fashioned so that they can be differentially used by some more effectively than others without credibility being denied to the institution or process, as a consequence of such differential use. It is also a 'trap' in that it invites — or necessitates — use and participation in the name of justice. But the adjudicatory process enmeshes initiatives rather than fulfil just expectations. Legal processes and institutions are necessarily complex. They promise a lot, permit far less, create a disciplinary framework in which an increasing amount of life must act and try and obtain a general consent for their work and rhetoric.

But law is not just process. It is also overtly ideological in nature. It articulates an ideology both for itself and society. Ideology, here, is used in three distinct senses. In the first sense, ideology speaks a general rhetoric. As rhetoric, it expresses in the most general possible terms a set of values which are designed to inspire general faith and elicit consent. In this sense, it has a very powerful sway over society. Its phrases like 'liberty', 'equality', 'justice', 'the rule of law' create a legal and political language which generates beliefs and expectations. The other two senses in which we use 'ideology' are much more specific. We shall call the second use 'constitutive' ideology. Constitutive ideology refers to the way in which social life and processes are described. The law identifies who may have rights and duties, how these are to be obtained and consecrated and how — if at all — they become defeasible. It determines the relationship between persons, things and processes. Finally, what is constituted has to be both explained as well as altered to meet new pressures. This process of explanation and change are the function of what we will call conceptive ideology. Conceptive ideology is the process of reasoning by which legal (and, therefore, aspects of social) reality are constituted and held together. Lawyers, judges and jurists are conceptive ideologists *par excellence*. Through their efforts and designs the complex mosaic of law is created and re-created. Many of the battles fought within judicial institutions are battles over conceptive ideology; and through that over the description, designation, disciplining and control over social process. In some societies, these ideological elements hold society together without the need for powerful State institutions. Hindu and Jewish societies are two such examples.

V

In the end, law is both process and ideology. Judges and the judicial power are both part of the State as well as the private market economy which regulates access to, and use of, this important part of the State. If we must judge the judges — as, indeed, we must — this is the framework within which judges and the judicial power should be judged.

REFERENCES

1. For those who actually believe that a neutrality is possible see H. Weschler, "Towards neutral principles of constitutional law" (1959-60) 73 *Har. L. R.* 1; H. M. Hart, "The time-chart of the justices" (1959-60) 73 *Har. L. R.* 34; L. Henkin, "Some reflections on current constitutional controversy" (1960-1) 1094 of *Pa. L. R.* 637; *cf.*, A. S. Miller and R. F. Howell, "The myth of neutrality in constitutional adjudication" (1959-60) 27 *U.C.L.R.* 661. Oddly enough, the effect of Dworkin's *Taking Rights Seriously* (1977) in asserting that judges are not arbitrary because they decide matters on principle must project the image that judges are safe and responsible.
2. Lord Devlin, *The Judge* (1976); *ibid.* "Judges as lawmakers" (1976) 39 *M.L.B.* 1; note also Edmund Davis, (who was then a judge in the English Court of Appeal) "Judicial Activism" (1975) *C.L.P.* 1.
3. Justice Krishna Iyer in *Kunhu Mohd.* v. *T. K. Ummayithi,* (1969) K.L.R. 629.
4. E. P. Thompson, *Whigs and Hunters* (1975).
5. Lord Denning in Ch. I of this book. For Denning's Philosophy of Law see *The Family Story* (1981) 171-83. For accounts of how Lord Denning himself has used this power see P. Robson and P. Watchman, (ed.), *Justice Lord Denning and the Constitution* (1981). For Lord Denning's own estimate of what he has done see, *The Discipline of Law* (1979); *The Process of Law* (1980); *What Next in the Law* (1982). Earlier explorations include *Freedom under the Law* (1949); *The Changing Law* (1953); *The Road to Justice* (1955). For an affectionate account see C. E. F. Rickett, "Lord Denning — Sincere Man and Problematic Judge" (1982) 10 *N.Z.U.L.R.* 91-110.
6. Judges are deemed outside power for the following reasons: (*i*) they are neutral, see Waschler *supra* note 1; (*ii*) they are principled, see Dworkin *supra* note 1; (*iii*) they are disciplined, see Denning *supra* Ch. I in this volume; (*iv*) they stick to legal rather than social justice; see Justice Hidayatullah, former Chief Justice of India's, C. K. Daphtary Memorial Lecture, 15 Aug. 1984, *Indian Express. Cf.*, Lord Scarman, "The law Lords and their role in Government" (1979) *New Society* (15 Nov. 1979) 383 at 384; "A fundamental truth . . . is that law and politics cannot, and at the highest level should not be kept separate."
7. On the importance of judicial review to the rule of law, one can do no better than refer to A. V. Dicey, *Introduction to the Law of the Constitution* (1885). For Lord Heward's classic restatement of this see *The New Despotism* (1929). The cause of judicial review is championed by H. W R. Wade, *Constitutional Fundamentals* (1982).
8. *E.g.*, E. P. Thompson, *supra* note 4; D. Hay, P. Linebaugh and E. P. Thompson (ed.), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (1975). For critical accounts see A. Merritt, "The nature and function of law: A criticism of E. P. Thompson's Whigs and Hunters" (1980) 76 *Brit. J. of Law and Soc.* 194-214; D. Phillips, "A just measure of crime, authority, hunters and blue locusts": The 'Revisionists' social history of crime and the law in Britain' in S. Cohen and A. Scull, *Social Control and the States* (1983). For the view that Thompson has blurred the economic and the socio-political see R. Johnson, "Thompson Genovese and Socialist-Humanist History" (1978) 6 *History Workshop* 79; *cf.*, K. McClelland, "Some Comments on Richard Johnson" (1979) 7

History Workshop 101; for an illuminating account about studying law through history see D. Sugarman, "Theory and Practice in law and history: A prologue to the study of the relationship between law and economy from a socio-historical perspective in Poob Fryer, A. Hunt, D. McBarnett and B. Moorhouse (ed.), *Law, State and Society* (1981). For an appreciative account of E. P. Thompson's contribution see P. Anderson, *Arguments within English Marxism* (1978).

9. For an account of the development of the modern law of contempt from the days of the Wilkes controversy see Dhavan, "The Philimore Committee Report and Contempt of Court" (1976) 5 *Anglo American Law Review* 186.
10. *E.g.*, H. M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus case* (1978) on the denial of judicial review in detention cases by the Supreme Court during the National Emergency (1975-77).
11. On the development of the summary procedure see J. Fox, "The summary process to punish for contempt" (1909) 25 *L.Q.R.* 185; *ibid. Contempt of Court* (1927).
12. See, Donnelly and Goldfarb, "Contempt of Court by Publication in the United States" (1961) 26 *M.L.R.* 239; Donnelly, *The Contempt Power* (1963).
13. See, P. Hollis, *The Pauper Press* (1970). For an interesting summary account see J. Curran and J. Seaton, *Power without Responsibility: The Press and Broadcasting in Britain* (1981) Chs. I and II.
14. Note the comments of Spring Rice *Hansard* 136 (1855) col. 966 cited by J. Curran and J. Seaton, *ibid.*, at 35 f.n. 3.
15. See, J. Curran and J. Seaton, *ibid.*, at 36; P. Hollis, *supra* note 13; J. Wiener, *The War of the Unstamped* (1969). *Cf.*, G. A. Cranfield, *The Press and Society* (1978).
16. J. Curran and J. Seaton, *ibid.*, at 43 ff.
17. *Wilmot's Notes of Opinions and Judgments*— published in 1802 by his son. On the effect of this judgment see Report of the Committee on *Contempt of Court* (1974) Cmnd. 5794 pr. 2 at 2.
18. For the Irish Judges views see Fletcher J. in *Taafe* v. *Downes*, (1813) 3 Mao. P.C. 36 at 46.
19. See Justice Holroy's judgment in *The King* v. *Clements*, (1821) 4 B. and Ald. 218.
20. *Roach* v. *Garvin*, (1742) 2 A.T.K. 469 at 471.
21. *R.* v. *Thomas Castro Onslow and Whalling*, (1873) 9 Q.B.D. 219 at 228.
22. *E.g.*, Wills J. in *R.* v. *Parke*, (1903) 2 K.B. 432 at 438.
23. The offence was invoked last in *R.* v. *Tibbits and Windburst*, (1902) 1 K.B. 77; see also *Report, supra* note 17 pr. 66 at 29 and conclusion 6 at 92.
24. *McCleod* v. *St. Aubyn*, (1899) A.C. 548.
25. *Id.* at 561.
26. *R.* v. *Gray*, (1900) 1 Q.B. 36. See further, Hughes, "Contempt of Court and the Press" (1900) 16 *L.Q.R.* 292.
27. *R.* v. *Wikinson*, (1930); *The Times*, July 16, 1930.

27a. *R.* v. *Colsy*, (1931) 47 *L.Q.R.* 315; see also *The Times*, May 9, 1931.

28. Lord Atkin in *Ambard* v. *Att. Gen. of Trinidad and Tobago*, (1936) All. E.R. 704 at 708.
29. Lord Denning in *R.* v. *Metropolitan Police Commr. Exparte Blackburn*, (1968) 2 All. E.R. 399.

30. *Report*, *supra* note 17 pr. 10 at 6; pr. 73 at 33; pr. 102 at 44; *cf*., pr. 166 at 70 (on the defence of public benefit).
31. See Justice Krishna Iyer in *Baradakant Mishra* v. *Registrar of Orissa High Court*, A.I.R. 1974 S.C. 710. For a review of further attempts to reinforce this see R. Dhavan and B. Singh, "Publish and be damned — The press at the Bar of the Supreme Court" (1979) 20 *J.I.L.I.* 1.
32. W. R. Anson, "*Demy* v. *Peek* in the House of Lords" (1890) 24 *L.Q.R.* at 72. Note the eulogy of the common law as "a monument of common sense" (at 74). I am grateful to D. Sugarman for directing me to this controversy.
33. See *R.* v. *Parke*, (1903) 2 K.B. 432. Note that the position as to when the law of contempt 'gag' is made clear in the Contempt of Courts Act, 1981.
34. Thus books like Street's, *Freedom, Individual and the Law* (1982 edn.) emphasise the dramatic cases. Such cases are goary (e.g., the *Crumbles Murder* case: *R.* v. *Editors and Printers and Publishers of the Evening Standard*, (1924) 40 T.L.R. 833; *Vampire* case: *R.* v. *Bolam exp. Haigh* (1949) 93 Sol. Jnl. 220; *Trunk murder* case: *R.* v. *Evening Standard Co. Ltd.*, (1954) 1 Q.B. 578; *Brothel* case: *R.* v. *Odhams Press Ltd. and Others*, (1957) 1 Q.B. 73, *etc*.).
35. *R.* v. *Evening Standards Co. Ltd.*, (1954) 1 Q.B. 578.
36. *R.* v. *Griffiths ex. parte Att. Gen.*, (1957) 2 Q.B. 192.
37. *E.g.*, *R.* v. *Malik*, (1968) 1 All. E.R. 586 (trial not influenced); *R.* v. *Thompson Newspapers Ltd. ex. p. Att. Gen.*, (1968) 1 All E.R. 268 (Newspapers, nevertheless, guilty of an offence).
38. *Att. Gen.* v. *Times Newspapers Ltd.*, (1973) All. E.R. 54.
39. Judgment of the European Court of Human Rights, 1978 (mimeo).
40. *E.g.*, see Donnelly and Goldfarb, *supra* note 12. Neiles and King, "Contempt by publication in the United States" (1928) 28 *Columbia L. R.* 401, 525; see especially *Bridges* v. *California* and *Times Mirror Co.* v. *California*, (1940) 314 U.S. 252.
41. See generally W. Twining, *Karl Llewellyn and the Realist Movement* (1974); also, note the comments on the Realists made later in this essay.
42. Bentham, *Of Laws in General* (1970 Hart edn.) 240.
43. For critical assessments of Bentham's *Fragment on Government* see "Rebuttal of Bentham and Austin on Blackstone" (1966-7) 13 *Loyola C. R.* 71; Finnis, "Blackstone's theoretical intentions" (1967) 12 *Nat. L. F.* 163.
44. *E.g.*, Hale, *History of the Common Law* (1820 edn.) I, 89; Blackstone, *Commentaries on the Laws of England* (1765) I, 63-4; 68-71; on Bentham's misunderstanding of the doctrine of precedent see A. R. V. Cross, "Blackstone v. Bentham" (1976) 92 *L.Q.R.* 516.
45. A very famous controversy was occasioned by the House of Lords in *Magor and St. Mellons, R.D.C.* v. *Newpost Corpn.*, (1952) A.C. 206 'ticking Lord Denning off for asserting that judges create law' Lord Denning's unrepentance is most clearly expressed in his Foreword to R. Dhavan, *The Supreme Court of India: A Socio-legal Analysis of its Juristic Techniques* (1977).
46. Lord Devlin, *Samples of Law Making* (1962) 119.
47. For the leading work in English Law, see, A. R. N. Cross, *Precedent in English Law* (1968 edn.). The doctrine of *stare decisis* was entrenched in *London Tramways Co.* v. *London County Council*, (1898) A.C. 375; see further R. W. M. Dias, *Jurisprudence* (1976 edn.) Ch. 6 esp. 170 ff. and the literature cited there.

48. On the departure from the doctrine of *stare decisis* in England see *Practice Statement* (1960) 1 W.L.R. 1234. For a review of precedent and how it is bypassed in India see R. Dhavan, *supra* note 45; for a further analysis of the contribution of Lord Reid in using the new found freedom see A. Paterson, *The Law Lords* (1982).

49. It is not easy to define the contours of the 'black letter' law tradition. On the one hand the tradition stresses the argument that law emanates from Parliament and the courts must be analysed within a particular tradition of legal practice. For a good example of the 'jurisprudence' that emerges from this tradition see *Salmond on Jurisprudence* (1966) (12th edn.). However, it is equally within the black letter tradition to adopt a court centred analysis of the principles underlying law; see Dworkin, *supra* note 1. For the link between the 'black letter' tradition and liberalism see D. Sugarman, 'The Legal boundaries of liberty: Dicey liberalism and legal science' (1983) 46 *M.L.R.* 102. The period of formulism within which the 'black letter' tradition was stabilized is difficult to interpret on the singularly, Weberian basis that 'rationalism' must precede or follow close on the heels of the rise of capitalism, see D. Sugarman, "Law Economy and the Spate in England 1750-1914 — some major issues" in D. Sugarman (ed.), *Legality, Ideology and the State* (1983).

50. The development of analytical theory can be processed through three distinct phases. The first emanating from Austin see *The Province of Jurisprudence Determined* and the uses of the *Study of Jurisprudence* (1954, Hart edn.) and Bentham see *Of Laws in General* (1970 Hart edn.). In this stage the emphasis was on the law declared by the sovereign power or cognized by courts. The second stage looks for some ultimate principle see J. Salmond, *Jurisprudence* (1902 edn.) norm, Kelsen, *General Theory of Law and State* (1943) or rule, H. L. A. Hart, *The Concept of Law* (1961). Hart attempted to base the new initiative on ordinary language theory. However, the third phase links 'law' with positivism and institutional analysis (see J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (1970). Apart from the *basis* on which law is established or cognized, analytical jurisprudence analyses what Hohfeld called *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (1923, Cook edn.). However, analytical theory disguises the subtle way in which 'law' came to recognize the rise of sovereign and bureaucratic judicial power. For a liberal attack on positivism see J. Shklar, *Legalism* (1970).

51. As part of the distinctness of law (without which the rest of the propositions might fall), it is necessary to separate law from morals — see H. L. A. Hart, "Positivism and the Separatism of laws and morals" (1937-38) 71 *Har.L.R.* 593. This can be attacked on the methodological ground that it is wrong to presuppose the 'is/ought' distinction in the case of certain kinds of institutional facts (see J. R. Searle, "How to derive 'ought' from 'is' in P. Foot, *Theories of Ethics* (1970) Ch. 7. Others have built on the complex nature of law as both 'fact' and 'value' to assert law's "inner morality" see Fuller, *The Morality of Law* (1964). Once 'law' is isolated and separated from both morals and politics, it is reduced to analytic proportions with specific recourse to the legislature (or judiciary) when there is a need for innovation.

52. C. H. S. Fifoot, *Judge and Jurist in the Reign of Queen Victoria* (1953) 15.

53. L. Jaffe, *English Law and American Judges as Law Makers* (1969) 2.
54. Henry Cecil, *The English Judge* (1970) 170.
55. See O. H. Holmes, "The Path of the law" (1897) 10 *Har. L.R.* 457. It may not be fair to Holmes to highlight just this aspect of his work, see Patterson, *Jurisprudence: Men and Ideas of the Law* (1953) 504-5; see also Howe, "The Positivism of Mr. Justice Holmes" (1951) 64 *Har. L.R.* 529; Hart, "Holmes' Positivism — An Addendum" (1951) 64 *Har. L.R.* 929; Howe, "Holmes' Positivism — A brief rejoinder" (1951) 64 *Har. L.R.* 937.
56. *E.g.*, J. C. Carter, *Law: Its Origin, Growth and Function* (1907).
57. R. Pound, "Mechanical Jurisprudence" (1908) 8 *Columbia L. R.* 605. On the impact of the early Pound see A. L. Harding, "Professor Pound makes history" in A. L. Harding (ed.), *Southern Methodist University Studies in Jurisprudence* (1957) IV. 3.
58. R. Pound, "The decadence of equity" (1905) 5 *Columbia L.R.* 20.
59. R. Pound, "Liberty of Contract" (1900) 18 *Yale L.J.* 454.
60. R. Pound, "Law in books and Law in Action" (1910) 44 *American L.R.* R. Pound, "Sociology of Law and Sociology Jurisprudence" (1943) 5 *A.B.A.J.* 55.
61. R. Pound, "The need of a sociological jurisprudence" (1907) 19 *Green Bag* 607; *ibid*: "The Scope and purpose of sociological jurisprudence" (1910-11) 24 *Har. L.R.* 591; (1911-12) 25 *Har. L.R.* 140, 189. See also R. Pound, "Sociology of Law and Sociological Jurisprudence" (1943) 5 *Univ. of Toronto L.J.* 1.
62. J. Stone, "The Golden age of Roscoe Pound" (1962) 4 *Syd. L.R.* 1; *ibid*: "Roscoe Pound and sociological jurisprudence" (1964-5) 78 *Har. L.R.* 1578; *ibid*: "A critique of Pound's theory of justice" (1934-5) 20 *Iowa L.R.* 531: see generally that volume (*i.e.*, Volume 78) of the *Harvard Law Review*) Pound's works are handsomely collected in his five volume *Jurisprudence* (1959).
63. J. Stone, "The golden age of Roscoe Pound" *supra* note 62 at 4.
64. R. Pound, "Do we need a philosophy of law" (1905) 5 *Columbia L.R.* 339.
65. R. Pound, "The theory of judicial decision making" (1922-3) 36 *Har. L.R.* 640, 802, 940 and note the analysis of G. Edward White, "From sociological jurisprudence to Realism: Jurisprudence and social change in the Twentieth Century" (1972) 58 *Virginia L.R.* 999 at 1009-12.
66. See R. Pound, "A call for a Realist jurisprudence" (1931) 44 *Har. L.R.* 697.
67. K. Llewellyn's reply on behalf of the Realists: "Some realism about Realism — Responding to Dean Pound" (1931) 44 *Har. L.R.* 1222; see also K. Llewellyn's "A Realistic Jurisprudence — the next step" (1930) 30 *Columbia L.R.* 432. In Llewellyn's reply most of the Realists affirm (one or two *dubitante*) their belief in the centrality of rules and the importance of traditional juristic techniques; see also G. Edward White, *supra* note 65.
68. K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960). Thus, judges like Holt, Mansfield and presumably, in our day Lord Denning belong to the 'grand' tradition. But, what exactly is so 'grand' about the 'grand' tradition? Is it a radical use of black letter law or the effective sponsoring of a social cause through a skilful use of techniques? *Cf.* K. Llewellyn: "How Appellate Courts decide cases" (1945) 16 *Pa. Bar Assn. Q.* 409.

69. K. Llewellyn and A. Hoebbel, *The Cheyenne Way* (1941); For an interesting insight into Llewellyn's approach to law see his *The Bramble Bush* (1930). For his approach to divorce law note the interesting "Behind the law of divorce" (1932) 32 *Columbia L.R.* 1281; and for his distinctive approach to contracts, *Cases and Materials on the Law of Sales* (1930); and see further W. Twining, "Two Works of K. Llewellyn" (1967) 30 *Mod. L.R.* 514. Llewellyn's commitment to a Parsonian functionalism emerges in *The Cheyenne Way* (1941) and his "The normative, the legal and law jobs: The problems of juristic method" (1940) 49 *Yale L.J.* 1355. Llewellyn deserves importance as the theoretician of the Realists.
70. For an adulatory, but not wholly uncritical account see W. Twining, *Karl Llewellyn and the Realist Movements* (1974); see also G. Edward White, *supra* note 67; see also C. E. Clark and D. M. Trubek, "The creative role of the judge: restraint and freedom in the common law tradition" (1961-2) 71 *Yale L.J.* 255.
71. Note specially the emphasis on trial courts. J. N. Frank, "What Courts do in fact" (1932) 26 *Ill. L.R.* 645; *ibid*: "Are judges human?" (1932) 80 *Univ. Pa. L.R.* 17; 233; *ibid*: "Cardozo and the upper court myth" (1948) 13 *L.C.P.* 369; *ibid*: "Courts on Trial: Myth and Reality in American Justice" (1949); *ibid*: "Short of sickness and death: A study of moral responsibility in legal criticism" (1951) 26 *N.Y.U.L.R.* 545; see also I. C. Rutter, "The trial judge and the judicial process" (1962-3) 15 *J.L.E.* 245; *cf.*, S. N. Verdun-Jones, "The Jurisprudence of J. W. Frank, A Study in American Legal Realism" (1973-76) 7 *Syd. L.R.* 180. However, it is wrong simply to depict the Realists as studying courts. This does not do justice to Moore's insistence that a "legal institution" was "a group of persons . . . acting in some way" (Moore, "Rational basis of legal institutions" (1923) 23 *Columbia L.R.* 609) and the work generated by such a methodology (*e.g.*, Moore and Sussman "Legal and institutional methods applied to the debiting of direct discounts — Legal method: Banker's set off" (1931) 40 *Yale L.J.* 381; Moore and Callahan, *Law and Learning Theory: A Study in Legal Control* (1943, mimeo *Yale L.J.*); Douglas and Thomas "Some functional aspects of bankruptcy" (1932) 41 *Yale L.J.* 329. Oliphant and Hope, *A Study of Daily Calendars* (1932). The best and most concise survey remains E. W. Patterson, *supra* note 55 at 537-63.
72. See D. M. Trubek, "Where the action is: critical legal studies and empiricism" (1983) mimeo. (I am grateful to Trubek for a draft copy); Schlegel, "American legal realism and the empirical social science: From the Yale experience" (1979) 28 *Buffalo L. R.* 459; *cf.*, Tushnet, "Post Realist Legal Scholarship" (1980) 15 *J.S.P.T.L.* 20.
73. See C. H. Pritchett, *The Roosvelt Court: A Study of Judicial Politics and Values 1937–47* (1948).
74. See G. Schubert, *Judicial Behaviour: A Reader in Theory and Research* (1964); *ibid.*, *The Judicial Mind* (1965): *Ibid.*, *Judicial Policy Making* (1974 edn.); G. Schubert and D. Danelski (ed.), *Comparative Judicial Behaviour* (1969); G. Schubert, *The Judicial Mind Revisited* (1974). *Cf.*, K. Becker, *Political Behaviour and Modern Jurisprudence* (1965).
75. For an example of this see D. Robertson, "Judicial Ideology in the House of Lords: A Jurimetric Analysis" (1982) 12 *Br. Jnl. of Pol. Sci.* 1. For a contrary view that such analysis is unsuited to the House of Lords see E. C. Morrison, *Courts and the Political Process in England* (1973). For interesting alternative socio-legal analysis see A. Paterson, *The Law*

Lords (1982); Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body* (1800-1976) (1979).

76. It is difficult to identify the neo-empiricists. (The most promising approach would be to locate them as those academics who were, and are, involved in the Wisconsin Civil Disputes Research Project. The hard core theoreticians of this group would be Marc Galanter, W. Felstiner, A Sarat, D. Trubek, S. Macaulay and J. Grossman. For an interesting reader on neo-empiricist theory see K. O. Boyum and C. Mather, *Empirical Theories about Courts* (1983). Here, too, the collection while espousing a neo-empiricist approach envelopes more than the 'hard core' neo-empiricist we have identified.

77. *E.g.*, M. Galanter, Reading the landscape of disputes: What we know and don't know (and think we know) about our alleged by contentions and litigious society" (1983) 31 *U.C.L.A.L.R.* 4 at 4-5.

78. M. Galanter, "Justice in many rooms" — Courts, private ordering and indigenous law" (1981) *Journal of Legal Pluralism.*

79. For an interesting review of the various managerial approaches see S. Krislow "Theoretical perspectives on case law studies: A critique and a beginning" in K. O. Boyum and L. Mather, *supra* note 76.

80. *E.g.*, Siesel, Kalven and Bucholz, *Delay in the Court* (1959). This was also the tone of the Indian Law Commission, 14th Report, *Reform of Judicial Administration* (1958) pr. 52 at 58-63; see also A. E. Levin and E. Wooley, *Dispatch and Delay: A Field Study of Judicial Administration in Pennsylvania* (1961); S. Flanders, *Case Management and Court Management in U.S. District Courts* (1977); Indian Law Commission 78th Report: *Delay in Trial Courts* (1979); E. Friesen and others, *Arrest to Trial in Forty Five Days* (1978); *ibid.; Justice in Felony Courts: A Prescription to Control Delay* (1979); R. W. Gillespie, *Judicial Productivity and Court Delay: An Exploratory Analysis of Federal Courts* (1977); T. Church Jnr., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (1978); J. Chapper and T. R. Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal* (1983); P. Connolly and M. Planet, "Controlling the Case Flow-Kentucky Style" (1982) 21 *The Judges Journal* 8. The emphasis in India has been on controlling delays through processual change and by tinkering around with the jurisdiction of the various courts under study; see Reports of the Indian Law Commission: 14th Report; *Reform of Judicial Administration* (1958); *ibid.*, 44th Report, *On the Appellate Jurisdiction of the Supreme Court in Civil Matters* (1971); 45th Report, *On Civil Appeals to the Supreme Court on a Certificate of Fitness* (1971); *ibid.*, 58th Report, *Structure and Jurisdiction of the Higher Judiciary* (1978); *ibid.*, 79th Report, *Delay in the High Courts* (1979); see also Shah Committee, *Report of the High Court Arrears Committee* (1972). From an organisational and management point of view the Shah Report considered the matter more extensively than the others. Some of these suggestions have been picked up by U. Baxi, *Crisis in the Indian Legal System* (1981) 68-77. One can hardly agree with the views of the editor of *Hindu* (21 February 1982) that the Law Commission's approach has been meticulous.

81. After the major Reform changes in the nineteenth century there have been several attempts to look at reforming the courts in England see *Final Report of the Committee on Supreme Court Practice and Procedure*

(1953) Cmnd. 8878 (Evershed Committee); *Report of the Committee on Personal Injuries Litigation* (1968) Cmnd. 369 (Winn Committee); *Report of the Committee on the Enforcement of Judgment Debts* (1969) Cmnd. 3909 (Payne Committee); *Report of the Royal Commission on Azzizez and Quarter Sessions* (1969) Cmnd. 4153 (Beeching Commission). Recently the Scarman Committee has looked at procedures in the Supreme Court. This Report is not available but many of its recommendations — have been implemented (see Speech of Lord Donaldson M.R., 5 October 1983 *The Times*). These Reports have been concerned with matters of geographic or procedural organization. There has been an increase in tribunal jurisdiction on which see *Report of the Committee on Tribunals and Inquiries* (1957, Cmnd. 218 Frank Committee) and the *Annual Reports of the Council of Tribunals* (1960-todate); L. Mohr, "Organisations, decisions and courts" (1976) 10 *Law and Society Review* 621; National Institute of Law Enforcement and Criminal Justice, *Comparative Research on the Organization of State Court Systems* (1979). Even within the management perspective, there is a need to see judges as a bureaucracy both from a theoretical and political science perspective see R. Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (1977).

82. S. Macauley, "Non-contractual relations in Business: A preliminary study" (1963) 28 *Am. Soc. Review* 55; see also *ibid.*, "Elegant models, empirical pictures and the complexity of contracts" (1977) 11 *Law and Society Review* 507; *ibid.*, "Lawyers and Consumer protection laws" (1979) 14 *Law and Society Review* 115; *ibid.*, *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (1966).
83. This phrase is used by R. Mnookin and L. Korhauser, "Bargaining in the shadow of the law" (1979) 88 *Yale L.J.* 950. Note also M. Damaska's phrase 'bargaining chips' in "A Foreign perspective on the American judicial system" in T. J. Fetter (ed.), *State Courts: A Blue print for the future* (1978) and for the plea that the role of the rules should not be too greatly undermined see D. J. McBarnett, "Pretrial procedures and the construction of conviction" in P. Carlen (ed.), *Sociology of Law* (1976). I am grateful to M. Galanter for the latter references.
84. Minookin and Korhauser, *ibid.*
85. W. Felstiner, "Influence of social organization on dispute processing" (1974) 9 *Law and Society Review* 63.
86. M. Galanter, "The modernization of law" in M. Weiner (ed.), *Modernization: The Dynamics of Growth* (1966); *ibid.*, "The displacement of traditional law in modern India" (1968) 24 *Jnl. of Social issues* 65; *ibid.*, "The aborted restoration of indigenous law in India (1972) 14 *Comp. Study in Society and History* 53.
87. M. Galanter, Why the Haves come out ahead: Speculations on the limits of legal change" (1974) 9 *Law and Society Review* 95.
88. W. Felstiner, R. Abel and A. Sarat, "The emergence and transformation of disputes: Naming, blaming and claiming. . . ." (1981) 15 *Law and Society Review* 631.
89. M. Galanter, *supra* note 77.
90. Implicit in M. Galanter, *ibid.* and in M. Galanter, *supra* note 78 which discusses the 'centrifugal' and 'centripetal' effect of 'law' and courts.
91. See R. Dhavan, "Understanding the Terrain of Litigation: Reflecting on an Indian case Study" (1984, Mimeo, paper for a conference, at Gummersbach, W. Germany in June 1984) on the litigation expressed.

92. In the context of the neo-empiricists see especially M. Galanter, F. S. Palen and J. M. Thomas, "The Crusading Judge: judicial activism in trial courts" (1979) 52 *South Calif. L.R.* 699.

93. See M. Galanter, "The mediating judge" (1984, mimeo. The first law and Society Lecture in Cardiff, England); *ibid.*, "So, what else is now?" (1983), mimeo, apex to the Law and Society Association Conference, Denver, (U.S.A.).

94. M. Galanter, "Making Law work for the oppressed" in R. Dhavan (ed.), anthology of Galanter's essays: *Law and Society in India* (forthcoming).

95. Dhavan, *supra* note 91, commentary on Galanter, *supra* note 77.

96. For a critique of the limitations behind this American approach see R. Dhavan, "Managing Legal Activism: Reflections on India's Legal Aid Programme" (1984, mimeo, Paper to the Conference on Critical Legal Studies, University of Kent).

97. *Supra* note 27.

98. *E. M. S. Namboodripad* v. *T. N. Nambiyar*, A.I.R. 1970 S.C. 2015.

99. *Id.*, pr. 27 at 2023.

100. *Id.*, pr. 34 at 2024-5.

101. The Weekly in question was *Blitz Weekly*, 26 December, 1970 at 17.

101[a]. S. D. Gupta, *The Judiciary and Political Order in India* (1980).

102. J. A. G. Griffiths, *The Politics of the Judiciary* (1977).

103. On the jurisprudence of interests see R. Pound, III *Jurisprudence* (1959) generally; J. Stone, *Social Dimensions of Law and Justice* (1966) Chs. 4-8.

104. *E.g.*, Charles Beard, *The Economic Interpretation of the Constitution* (1913) which is a very interesting classic of the period.

105. Note the work of J. W. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin* 1836-1915 (1964); *ibid.*, *Law and Social Order in the United States* (1977); *ibid.*, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956) and note the comments of Sugarman in Review article (1980), *Br. Jnl. of Law and Soc.* 297 at 301-2.

106. M. J. Horwitz, *The Transformator of American Law 1780-1860* (1977). For a critique from an older historical tradition see A. W. B. Simpson, "The Horwitz thesis and the history of contracts" (1979) 46 *Univ. of Chic. L.R.* 533; In the Horwitz mould see P. S. Atiyah, *The Rise and Fall of Freedom of Contracts* (1979); see further book review Sugarman, *ibid.*

107. P. Anderson, *supra* note 8.

108. E. P. Thompson, *Whigs and Hunters* (1975); for comments see *supra* note 8.

109. Douglas Hay, "Poaching and the game laws on Cannock Chase" in D. Hay, P. Linebaugh and E. P. Thompson (ed.), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (1975) and "Property, Authority and the Criminal Law" in the same volume.

110. U. Baxi, *Crisis in the Indian Legal System* (1982) 356-358.

111. U. Baxi, *The Supreme Court and Politics* (1980).

112. For a powerful exposure of law and the legal system see Z. Bankowski and G. Mungham, *Images of Law* (1976). For an unmasking of great American appellate judges see J. T. Noonan, "*Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Whyte as makers of the Masks* (1976). For a review of the importance of organizational and other skills

and their influence see R. Danzig, *The Capability Problems in Contract Law: Further Readings on well-known Cases* (1978). Finally, A. W. B. Simpson has commenced some very interesting historical background research on leading cases like *Ryland* v. *Fletcher,* (1868) L.R. H.L. 330 (which established a cause of action in tort) and *R.* v. *Dudley and Stephens,* (1884) H.Q.B.D. 273 (which arose out of a shipwrecked captain and mate eating the cabin boy. These are various methodological devices to expose the law ranging from a total rejection (Bankowski and Mungham) to the gentler socio-legal expose randomly listed in this note. It is necessary to reiterate our view that such an expose should be located in the context of that part of the political economy pertaining to lawyering and the courts.

113. *E.g.,* R. Abel, A comparative theory of dispute institutions in society" (1974) 8 *Law and Society Review* 217; *ibid.,* Galanter, *supra* note 78.

114. See especially R. Abel, (ed.), *The Politics of Informal Negotiation* (1982 in 2 Volumes).

115. M. Cain, "Necessarily out of touch thoughts on the social organization of the Bar", P. Carlen (ed.), *Sociology of Law* (1976).

116. This is one of the implications of modern law which is much more closely pre-packed for the judge than in the common law traditions (see Galanter, *supra* note 86). It is in this sense that Lord Devlin felt that the categories of even the common law were now closed (see Devlin, *supra* note 46).

117. Very little work has really been done on the ambit of public influence of the private market economy of law. To take an inter Indian example, the usual studies on lawyers look at how 'lawyers' manage their affairs in respect of clients, *e.g.,* Kidder, "Formal litigation and professional insecurity: Legal entrepreneurship in South India" (1974) 9 *Law and Society Review,* 11; C. Morrison, "Munshis and their masters: The organization of an occupational relationship in the Indian Legal System" (1972) 31 *Journal of Asian Studies,* 309; J. S. Gandhi, *Lawyers and Touts: A Study in the Sociology of Legal Profession* (1982); this is also true of the theoretical literature (*e.g.,* T. G. Oomen, "The Legal Profession in India; Some sociological perspectives"; N. R. Madhava Menon (ed.), *The Legal Profession: A Preliminary Study of the Tamil Nadu Bar* (1984). What is needed is a study of the bar in the context of the State and political economy and not just in relation to their clients.

118. I am grateful to George Gadbois for this phrase. For some work on the finances of courts see R. Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (1979); *ibid,* "Figuring out the Supreme Court" and "Figuring out the Allahabad High Court" (Both papers for the Bar Association of India, mimeo, 1984).

119. M. J. Pusey, *The Supreme Court Crisis* (1937); I. R. Stone, *The Court Disposes* (1937); E. S. Corwin, *Constitutional Revolution* (1941); R. Jackson, *The Struggle for Judicial Supremacy* (1941); C. H. Pritchett, *supra* note 73.

120. *E.g.,* Johnson, *Professions and Power* (1973); see also *Illichetcal Disabling Professions* (1977). *Cf.,* D. Rueschenmeyer, "Doctors and Lawyers: A comment on the theory of professions" (1964) *Canadian Review of Sociology* 17; *ibid., Lawyers and their Society* (1973) and compare the approach of Kidder, *supra* note 117. For a case study on the social and political power of the legal professions see R. Dahrendorf, "The educa-

tion of an elite: Law faculties and the upper German class" (1962) *Transactions of the First World Congress of Sociology* 17.

121. M. Cain, "General Practice of a lawyer and client" (1979) 7 *Intl. Jnl. of Soc. of Law* 331. However, Cain does not explore further the political economy implications of the notion of lawyers (*i.e.*, professionals as 'translators' and 'conceptive ideologists'. *Cf.*, O. Mendolsohn, "The pathology of the Indian Legal System" (1981) 15 *Modern Asian Studies* 823. For an attempt at such an approach see R. Dhavan, *Only the Good News: On the Law of the Press in India* (forthcoming) Ch. X.

Part II

JUDGES AND THE JUDICIAL POWER

3

JUDICIAL DISCRETION

DAVID PANNICK

I

Wherever courts sit, judges have been troubled by the proper scope and application of their powers.[1] Whether they are sitting to hear constitutional, criminal, family, industrial or contract cases, judges cannot but be aware that they are faced with disputes the answers to which are difficult to ascertain.[2] Much of the factual evidence presented to the judge will be vague, incoherent or incomplete; some of it will be self-contradictory; most of it will be disputed by the opposing party. There are, as many courts have observed, a curiously large number of collisions between two or more stationary vehicles. Nor do judges find it easy to decide the appropriate sum of compensation to award for a personal injury caused by the negligence of a defendant; the proper sentence for a convicted criminal; whether to grant to a plaintiff the equitable remedy of an injunction; and whether to award costs to a successful party. Questions of law can be as problematic. By reason of the doctrine of precedent, judicial decisions on such matters of law can be as important to society as they are to the litigants, having as pervasive an impact on the life of the nation as an Act of Parliament. Indeed, the decision of a constitutional court striking down as unconstitutional a legislative or executive act is even more powerful than the decision of Parliament since it may be overruled only by a constitutional amendment (or by a later court decision). The importance of a theory of adjudication — to justify, to explain and to provide standards for the exercise of judicial power — is undeniable.

II

The formalist theory that in resolving legal disputes judges always declare the answers contained in a written constitution, code or statute or derived logically from existing case — law has had many distinguished proponents. Francis Bacon wrote that "Judges ought to remember that their office is jus dicere and not jus dare; to interpret law and not to make law, or give law".[3] Montesquieu argued that "The Judges of the nation are only the mouths that pronounce the words of the law, inanimate beings who can moderate neither its force nor its rigour".[4] John Marshall, Chief Justice of the U.S. Supreme Court, stated as late as 1824 that "Judicial power, as contradistinguished from the powers of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[5]

Denial of judicial power served an important social function. While the law was presented and accepted as an impersonal, objective, logical, scientific, timeless and gapless system, the judiciary could, without provoking controversy, impose its own principles and policies to resolve complex social problems which the legislature had not considered. Marshall's theories of judicial subservience made more palatable his creation for the Supreme Court in *Marbury* v. *Madison*[6] of a role not expressly given to it by the Constitution, that of deciding when legislative and executive acts are unconstitutional. Coke and Blackstone agreed that the common law was the embodiment of reason. One consequence of such beliefs, and one aspect of adjudication necessary to preserve such ideals, was the absence of the dissenting judgment. During the 32 years that Lord Mansfield was Chief Justice of the King's Bench (1756-88) there were only 20 cases in which the court was not unanimous.[7] Chief Justice Marshall similarly concealed any judicial doubts and equivocations, discouraging dissents and concurring opinions. Justices were persuaded to subscribe to conclusions they believed to be erroneous. Marshall himself was prepared to write the opinion of the court even though he disagreed with the judgment of his brethren.[8] Of the House of Lords as late as the 1880s, Robert Stevens remarks that "compared with the position today, the House was a remarkably unanimous body".[9]

Bacon's assessment of the judicial role now seems as anachronistic as his scientific experiments. Montesquieu's statement is as unrealistic a description of social practice as his portrayal of the separation of powers. Unanimity of judicial opinion and incantations of the excellence of the common law could not conceal the gaps in the legal code, the ambiguity of statutory language and the conflicts of principle that called for resolution. It could not be ignored that, as Vaughan C.J. said in *Bushell's* case, "I would know whether any thing be more common than for two men, students, barristers or judges, to deduce contrary and opposite conclusions out of the same case in law".[10] Jeremy Bentham ridiculed the idea that all law is embodied in statutes made by Parliament. Judges make law for men. "Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. . . ."[11] If lawyers disagreed about the correct solution to hard cases and if Parliament supplied no answer, the result would inevitably depend upon the identity of the judge.[12]

The theory that there is no correct legal answer to hard cases and that the judge must therefore exercise a discretion has passed through all the preliminary stages of intellectual development. It is a history familiar to all students of the progress of ideas, whether those ideas be scientific, philosophical, political or economic. In its infancy, the idea is rejected as inconsistent with received dogma and actual practice. Its supporters are abused for their folly, immaturity and ignorance. They are denied status and respect in the academic and professional community. The second stage arrives when the intellectual establishment considers the merits of the new idea. They weigh its arguments, test its premises and eventually conclude that it contains an element of truth. But, at this second stage, the idea, if privately acknowledged to be of value, is still denied the public recognition and discussion that it deserves. The intellectual elite may have a number of reasons for this attitude: preservation of the reputation of other theorists; jealousy; concern (whether or not misguided) for the public interest and for the social and other consequences of the new truth. Eventually public concealment becomes a fiction[13]. A desire to avoid reality becomes a matter of convenience, a lazy reluctance to amend the established forms to take account of new developments. The time that elapses before the third stage — that of public acknowledgment of the value of the new idea — is reached depends upon a number of variables: the power and depth of the insight; its practical utility and consequences; the strength of the vested interests it must overcome.

The final danger which all novel concepts must defeat is to be denied entry to a fourth stage of acceptance, wherein the procedures and the substance of decision-making are amended to take account of the theoretical analysis. The conservatives who have failed to conceal the veracity of the thought will now make a concerted effort to minimise its impact by denying its importance. The theory they have been hitherto dismissing as fundamentally wrong is now adopted as stating the obvious, as worthless and redundant.

Modern, non-formalist theories of adjudication have surmounted almost all of these hurdles. The judiciary of each developed nation has identified the very real scope of its discretion in fact-finding and in law-making in hard cases. Even the English judiciary, not noted for the breadth of its understanding of jurisprudential issues,[14] has appreciated the scope of its powers in construing legislation[15] and in developing the common law.[16] Yet the judiciary remains on the threshold of the institutional reform required as a consequence of the realisation of its powers. This has given time for the conservatives to polish their theories and to present them in a more sophisticated form. Lord Devlin and Professor Ronald Dworkin (on opposite sides in an earlier jurisprudential debate about the legal enforcement of morality) have emerged as the defenders of an improved formalism. The delay in producing a coherent theory of adjudication and in implementing reforms to seal the defeat of formalism has had a second consequence in bringing forward more radical spokesmen who have accused the judiciary of abusing its powers for the furtherance of narrow political and class goals. Professor John Griffith has presented those arguments most forcefully.

Before examining these different approaches to judicial power, one can draw two preliminary conclusions. First, that the judiciary is emerging as a subject of debate in public and academic fora. Jurisprudence has ceased to be preoccupied with the meaning of "possession" and has begun to appreciate the importance of adjudication. Secondly, that the judiciary is caught between the extremes of those who deny it any discretion to make law and those who insist that it has too much discretion which it uses in a politically partisan manner. The need exists for a programme of reform that recognises judicial power yet seeks to implement reform in a constructive style. The institution of the judiciary remains unamended in all important particulars since the nineteenth century and the content of the debate has not altered since Charles Dickens described it in *Bleak House*. At one extreme are those who contend, as did Sir Leicester Dedlock, that the court "even if it should involve an occasional delay of justice and a trifling amount of confusion" is devised "by the perfection of human wisdom, for the eternal settlement (humanly speaking) of everything. And he is upon the whole of a fixed opinion, that to give the sanction of his countenance to any complaints respecting it, would be to encourage some person in the lower classes to rise up somewhere — like Wat Tyler". At the other extreme are the radicals, like Mr. Bonython, convinced that there is only one solution to the defects of the court:

> Nothing but a mine below it on a busy day in term time, with all its records, rules and precedents collected in it, and every functionary belonging to it also, high and low, upward and downward, from its son the Accountant-General to its father the Devil, and the whole blown to atoms with ten thousand hundred weight of gun powder, would reform it in the least.

On examination, the position of neither party is tenable.

III

In *The Judge,*[17] Patrick Devlin distinguishes between activist and dynamic law-making. Activist law-making takes ideas from the public consensus and is permissible; dynamism requires the application of ideas in advance of the consensus and is impermissible. "The public is not interested in the common law as a whole. When it becomes interested in any particular section of it, it calls for a statute; the rest it leaves to the judges. The consensus is expressed in a general warrant for judicial law-making." Operating within the consensus means that "The subject-matter of the case must either be one . . . on which the public is indifferent, i.e. willing to leave to the judges, or one . . . in which the view of the public is all one way; it must not be one . . . on which, though it is within the province of the common law, the public holds differing views."

This theory raises a number of problems. First, how is a judge to ascertain public opinion on matters raised in court? He has no public opinion poll to guide him, no jury to decide the case with him. Secondly, are the issues of the extent of liability for negligence and the existence of punitive damages in civil cases really matters which the public is content to leave to the judiciary (as Devlin asserts)?

It may be thought that the absence of public debate on these issues in hard legal cases is indicative less of popular willingness to leave such matters to judicial resolution and more indicative of the inadequate publicity given to the problem and of professional reluctance to explain to the public the nature of adjudication and the question for debate. To accept Devlin's thesis is to believe that because the decisions of the House of Lords in *Herrington* v. *British Railways Board,*[18] *Rondel* v. *Worsley*[19] and *R.* v. *Sang*[20] provoked little public debate (albeit they caused much controversy in legal circles) they can therefore be cited as evidence of a public consensus that occupiers of land should owe a duty of care to trespassers, that barristers should not be liable for negligence for work performed in court, and that a trial judge should have no discretion to exclude otherwise admissible evidence on the ground that it was obtained in an illegal or improper manner. Of course, any attempt to construct a consensus of public opinion on these issues would be ridiculed. They pose controversial questions of public policy and their translation into legal language and their resolution by the judiciary when applying the common law does not make it otherwise.

Devlin's jurisprudence is based on a premise of lawyer's law that denies the interest of non-lawyers in the decisions that will vitally affect the nature of their society. One can as convincingly speak of economic policy as the exclusive reserve of civil servants, strategic arms control as the preserve of the military. The man in the street may not appreciate the complexities of the issue, and he may not have access to adequate information about the details of the debate, but that cannot justify an elitist theory that seeks to defend judicial power by inventing a fiction that a consensus exists or that the public has no interest in how the question is answered. Perhaps we "ought to recognise a difference between cases where we are dealing with 'lawyer's law' and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers".[21] But that distinction would need to be drawn so that the cases mentioned above are not categorised as 'lawyers' law'; that category would then be irrelevant to explain and justify judicial discretion in hard cases.

A final objection to Devlin's theory concerns the choice he offers to the judge in the hard case : either you make law or you do not; it is permissible for you to make law only when you can do so without straying from activism over the frontier into dynamism. Devlin's error is in his analysis of the nature of the hard case. The judge is there faced not by a choice between maintaining the old law or manufacturing new law. Rather he has a choice between alternative solutions to a novel point of law. Neither of those solutions is legally required, each of them is legally justified. However the judge decides the case he will be making new law.

In asserting that judges should avoid making law dynamically, Devlin is, therefore, not demonstrating fidelity to 'law'. In hard cases, 'law' makes no unequivocal demand as to the decision the judge should reach. Devlin is developing a political theory. Given that judges do make law, his thesis implies, they should do so conservatively. This ceases to be a matter of jurisprudence and becomes a matter of political philosophy. Conservatives will approve the suggestion that law-makers should produce conservative laws. Devlin's dichotomy of activism and dynamism conceals the issue: the question in hard cases is not whether judges should make law but how they should make it and why *they* should make it.

Nor are the issues resolved by Ronald Dworkin in *Taking Rights Seriously*.[22] He attacks the theory that in hard cases judges exercise a quasi-legislative discretion in deciding for one party or the other. He rejects this as descriptively false and as normatively unsatisfying because undemocratic (it involves law-making by an unelected judiciary) and unfair (those laws are applied to the parties *ex post facto*). For Dworkin, adjudication concerns the weighing and the application of competing rights. Even in a hard case, one party has a right to win. Law consists of the rights stated in legislation and in case-law plus the rights implied by the political and moral theory that best explains and justifies the body of statutes and case-law. The task of the judge in the hard case is to construct that part of the ruling political and moral theory relevant to the case before him, and to apply the rights recognised by that theory to the facts of the case.

It does not seem to worry Dworkin that his theory is doubtful as descriptive truth of the adjudicative process. If judges do construct political and moral theories that best explain and justify the existing legal material they rarely (if ever) say so.

Dworkin's objective is to deny judicial discretion by postulating the existence of a right answer to every hard case. To achieve that objective, it is necessary to find one ruling political and moral theory. Yet law lacks the unity of purpose and the consistency of content necessary to provide a correct formula, a pattern that will yield up a solution to every hard case if only we are skilled enough to understand its guidance. Indeed, there is a conflict between Dworkin's political theory and his jurisprudence. He asserts that men have rights against their government which are not created by legislation or by explicit social custom but are independent grounds for assessing that legislation or custom. Those rights are the consequence of a liberalism that denies a coherent, structured theory of life from which political and moral decisions could be derived. The inevitability of a conflict of values ensures the need for individual choice, the framework of liberalism. Yet this recognition of discretion at the stage of legislation vanishes at the stage of adjudication; the judge is, if possessed of sufficient skill, able to develop and apply a formula which weighs and ranks all relevant material.

Dworkin appears to concede that the judge may be able to construct alternative political theories each of which is consistent with the positive law. He suggests that there are two criteria relevant to the task of ascertaining the ruling theory: its fit with the positive law (i.e. it must not say of too many past judicial decisions that they were wrongly decided) and its moral acceptability.[23] If alternative ruling theories can exist, giving different rights applicable to the determination of a hard case, then a doctrine of judicial discretion is revived, albeit at a higher level.

There are other elements of Dworkin's rights thesis that are unconvincing: that in deciding hard common law cases the judge considers (and should consider) only the rights of the parties and pays no attention to the costs or the benefits to the community at large; that the doctrine of precedent assists the judge in applying the entitlements of the litigants; and that the resolution of a hard case by reference to political and moral rights which are unknown to and undiscoverable by the litigants prior to their articulation by the judge is distinct from the application of *ex post facto* law.

Judicial discretion survives the attempt of Ronald Dworkin to deny its existence. As Felix Frankfurter advised President Roosevelt, "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and not the Constitution. And I verily believe that that is what the country needs most to understand."[24]

In *The Politics of the Judiciary*,[25] John Griffith argued that judicial decisions demonstrate "a remarkable consistency of approach . . . concentrated in a fairly narrow part of the spectrum of political opinion." He asserted that, in deciding legal issues which have important moral, political and social consequences, judges adopt a particular conception of the public interest:

> It concerns, first, the interests of the State (including its moral welfare) and the preservation of law and order, broadly interpreted; secondly, the protection of property rights; and thirdly, the promotion of certain political views normally associated with the Conservative party.

Yet the vast majority of law cases involve competing litigants who derive from the same social class (whether they are large corporations, insurance companies, squabbling neighbours or divorced spouses). Professor Griffith's analysis is defective in the rigid uniformity of judicial politics it presents. He does not consider the question of judicial power within a jurisprudential context, and so he fails to debate whether judicial bias can be eradicated.

Aristotle urged that as many issues as possible should be decided by the legislator, and as few as possible by the discretion of the judge because "in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain."[26] What Professor Griffith, and too many other critics of the judiciary ignore, is that judicial bias is inevitable as long as we are judged by men and not machines.

> Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness for such dispassionateness signifies utter indifference. . . . An 'open mind', in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble minded.[27]

In *Public Utilities Commission* v. *Pollak*,[28] the U.S. Supreme Court upheld the constitutionality of the policy of a street railway company which had installed in its passenger vehicles loudspeakers for the broadcasting of music and commercials. The court rejected the contention that the broadcasts offended against the guarantees of free speech and due process of law. Justice Douglas dissented on the ground that the company was forcing "a captive audience" to listen. Justice Frankfurter took no part in the decision, for reasons which he explained. A judge "must think dispassionately and submerge private feeling on every aspect of a case . . . my feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."

The problem of subconscious judicial bias cannot be defeated by judges constantly excusing themselves from hard cases: decisions must be reached. Nor can we realistically hope to destroy such bias by the quality of those appointed to the Bench. Judges cannot be expected to display the commitment to impartiality exemplified by Lord Mansfield. After his library was destroyed in a fire started by the Gordon rioters in 1780, the Chief Justice presided at the trial of Gordon and conducted the proceedings (which resulted in the acquittal of Gordon on the charges of high treason) in an exemplary fashion.[29] In all other cases we should remember that, as Laski wrote to Justice Oliver Wendell Holmes, "judges are human beings; it would be a great help to jurisprudence."[30]

The only solution to judicial bias is to ensure, by the methods of training, appointment and discipline of the judiciary, that those who serve on the Bench are aware of their discretionary powers and that they present, as a whole, a wide range of classes, interests and political and moral views.

IV

An adequate theory of adjudication will recognise that in hard cases there are no correct legal answers. The judge must use his discretion in deciding between alternative solutions each of which is legally permissible. The choice between the alternative answers should be made by reference to extra-legal criteria. A narrow legalism should be abandoned in favour of consideration of moral, economic and social factors. If no legally correct decision exists, why should the judge not search for the best solution all things considered? Such a theory of adjudication necessitates amendments to judicial administration. Only some disputes will be hard cases to which the law does not provide a correct answer. But to resolve those disputes one requires a judiciary trained to understand the impact of extra-legal factors and capable of applying those factors. Advocates will need to present arguments to the court concerning the proper application of those extra-legal factors.

In determining what extra-legal factors to apply, and how to apply them, judges will need to recognise the only justification for their powers in a democracy : to protect the fundamental rights of the litigants and of third parties. Whether there exists a written constitution defining those rights or an unwritten constitution in which the rights are implied, it is the task of the unelected judge to remember that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[31]

In a country whose constitution guarantees fundamental rights against the State, giving the court the ability to strike down legislative and executive action as unconstitutional, the judge has great power and enormous responsibility. The judicial function in hard constitutional cases can only adequately be performed by a judge aware of the discretion that is involved and willing to use that discretion to further human rights. It is the greatness of Justice Krishna Iyer that his opinions on the Supreme Court of India recognised and furthered this judicial role, describing on many occasions the extra-legal factors which guided his exercise of discretion. What he attributed to Article 21 of the Indian Constitution is in no small measure due to his influence: "Today, human rights jurisprudence in India has a constitutional status and sweep. . . ."[32]

REFERENCES

1. This has often resulted in differences of opinion, and even hostility amongst judges. After his vigorous dissent in *Liversidge* v. *Anderson* (1942) A.C. 206, Lord Atkin incurred the social ostracism of his colleagues. For a time they refused to eat with him [see Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979) 287]. Enmity between judges is by no means a rare phenomenon. On the United States Supreme Court, Justice McReynolds, a devout anti-semite, refused to acknowledge or to speak to Justice Brandeis for several years after the latter's appointment in 1916. The post-war Supreme Court was embittered and polarised by the personal quarrel, conducted in public, of Justice Black and Justice Jackson. Rose Bird, Chief Justice of the California Supreme Court told the State Judicial Performance Commission in 1979 that for two months she had not been on speaking terms with one of her brethren. He had, she complained, insulted her in a footnote to one of his opinions. She explained that she had, to a certain extent, revenged herself, by refusing to keep a promise to give the old carpeting from her office to an unfortunate assistant of the estranged judge.

   Justice Krishna Iyer, in whose honour these essays are written caused "discomfiture and distress" to at least one of his colleagues, Justice Tulzapurkar — for introducing concepts, ideas and language into his judgments that have "no proper place in judicial pronouncements" (see *Manohar* v. *Marotrao*, A.I.R. 1979 S.C. 1084 at 1095). Justice Krishna Iyer answered his critics by stressing the importance of "socio-economic apercus", refusing to accept that "judicial judgment shall be a dry statement of facts (and a) drier statement of law" and arguing that it was the role of the court to communicate to its constituency "the glow of life-giving principles rooted in social sciences and translated into juristic rules which legitimate our institution functionally" (see *Organo Chemical Industries Ltd.* v. *Union of India*, A.I.R. 1979 S.C. 1803 at 1804). Quite apart from his undoubted candour and the beneficial consequences his judgments have had to protection of human rights in India, (see *Maneka Gandhi* v. *Union of India*, (1978) 1 S.C.C. 248 at 328). Justice Krishna Iyer's articulation of her judicial philosophy forces us to consider and develop a theory of adjudication as a whole.
2. In attempting to resolve these issues, we need to remain aware of the essential similarities in the judicial role wherever it is performed. As Louis L. Jaffe argues in *English and American Judges as Lawmakers* (1969) 5: "Whether enforcing constitutions, written or unwritten, interpreting statutes or applying the common law, the job is much the same, the difference is one of degree. . . . The judges of England perform the same functions as do the judges of the United States — or France or Italy or Germany."
3. *On Judicature.*
4. *The Spirit of the Laws* (1949).
5. *Osborn* v. *Bank of the United States*, (1824) 9 Wheaton 738, 866.

6. (1803) 1 Cranch 137.
7. See C. H. S. Fifoot, *Lord Mansfield* (1936) at 46-7. In *Millar* v. *Taylor*, (1769) 4 Burrows 2303, 2395, Lord Mansfield said: "This is the first instance of a *final* difference of opinion in this court, since I sat here. Every order, rule, judgment, and opinion, has *hitherto been unanimous*". He explained that "This gives weight and dispatch to the decisions, certainty to the law, and infinite satisfaction to the suitors: and the effect is seen by that immense business which flows from all parts into this channel."
8. John R. Schmidhauser, *Judges and Justices* (1979) at 115-6.
9. *Supra* note 1 at 70n.
10. (1670) Vaugh. 135, 141.
11. Bowring ed., *Truth versus Ashhurst* in Jeremy Bentham *Works* (1843) vol. 5 at 235.
12. Hence Voltaire complained that his "lawsuit was heard in one of the courts, and I lost everything by one vote. My advocate told me that I would have won it by one vote in another court. . . ." (*Philosophical Dictionary: On laws*). Lord Simon, concerned that this should not occur in the House of Lords, argued that the court should be reluctant to use its powers (given by a 1966 *Practice Direction*) to overrule its previous decisions "particularly since Appellate Committees do not sit in banc, so that similar arguments might be put forward in successive cases in the hope of finding a favourably constituted committee" (*Jones* v. *Secretary of State for Social Services* [1972] A.C. 944, 1024).
13. See Lon L. Fuller, *Legal Fictions* (1967).
14. Judge Argyle, trying an obscenity case in 1970, had not heard of H. L. A. Hart: see Tony Palmer *The Trials of Oz* (1971) at 165.
15. "The court may describe what it is doing in tax appeals as interpretation. So did the priestess of the Delphic oracle. But whoever has final authority to explain what Parliament meant by the words that it used makes law as if the explanation it has given were contained in a new Act of Parliament. It will need a new Act of Parliament to reverse it": Sir Kenneth (now Lord) Diplock, *The Courts as Legislators* (1965) at 5-6.
16. "No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point in time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place": *Lister* v. *Romford Ice & Cold Storage Co.*, [1957] A.C. 555, 591-2 per Lord Radcliffe.
17. (1979). I have already offered some thoughts on Devlin's jurisprudence in a book review: 1980 *Public Law* 345.
18. [1972] A.C. 877.
19. [1969] 1 A.C. 191.
20. [1980] A.C. 402.
21. *Pettitt* v. *Pettitt*, [1970] A.C. 777, 795 per Lord Reid.
22. (1977). I have already had two attempts at criticising Dworkin's theory: "A Note on Dworkin and Precedent" (1980); 43 *Modern Law Review* 36; "Of Hard and Easy Cases", *Encounter* (1981) at 50.
23. See *Taking Rights Seriously* (1978: New Impression with a reply to critics) at 340-1; Ronald Dworkin, "How to Read the Civil Rights Act", (1979) *New York Review of Books* 20 at 41.

24. Max Freedman, ed., *Roosevelt and Frankfurter: their Correspondence 1928-45* (1967) at 383.
25. (1977).
26. *"Art" of Rhetoric* 1.1.7.
27. *In Re J. P. Linahan* 138 F. 2d 650, 651-2 (1943) per Jerome Frank J.
28. (1952) 343 U.S. 451.
29. See John Lord Campbell, *The Lives of the Chief Justices* (3rd ed. 1874) vol. 3 at 419-21.
30. Mark de Wolfe Howe, ed., *Holmes-Laski Letters* (1953): 20 March 1927.
31. *West Virginia State Board of Education* v. *Barnette,* (1943) 319 U.S. 624, 638 per Jackson J.
32. *Sunil Batra* v. *Delhi Administration,* A.I.R. 1980 S.C. 1579, 1588.

4

THREE MODELS OF THE JUDICIAL FUNCTION

JOHN BELL

If politics be defined as the exercise of human influence over interpersonal relations[1], then judging, as one of the functions of the State, is necessarily a political activity. This is certainly true of contemporary societies where adjudication has a special place in establishing peace and order in relations between individuals and also in achieving some degree of substantive justice. In easy cases, those where there are precise rules of clear application, the political function of the judge may appear simply the instrumental one of giving effect to the policies established for him by the legislator or by precedent. However, there remains a significant area of unsettled or unclear law in which the judge has to act in a more creative manner and this activity constitutes much of the work of the higher courts. The way in which such hard cases are resolved necessarily involves value judgments about what is the best rule which the decision-maker can adopt to govern particular relationships. In some respects at least, judging involves giving direction to society and that is quite clearly a political activity. The truth of this proposition is most obvious in a country where the judiciary has the task of interpreting a constitution, but it is equally applicable to other branches of the law.

To say that the judicial role in a country is "political" in the sense just described is, however, to say very little. Although many might object to the label "political" as a description in this context, the apparent conflict is semantic rather than substantive. The real debates among judges and commentators about the political character of the judicial function concern rathermore the kind of political role which is appropriate and the nature of the political power which is in fact wielded. It is on the current state of this debate within

Anglo-American jurisprudence that the present essay will attempt to shed some light.

Within a democracy it is right that political institutions should be kept under review and criticised in the light of their performance in the service of the changing needs of society. Just as the role of the State is contested, so the proper role for the judiciary is the subject of differing opinions. The political function of the courts is, however, not the private concern of lawyers, but is one for the whole of the society which they serve and seek to regulate. Nevertheless, the lawyer and the legal philosopher may have an important role in stimulating the debate among the rest of society.

The common law system of personalised judgments, in which India participates, enables citizens to see where individual judges stand on the kind of political role they should play. The creative tensions of disagreement may, in the end, be more fruitful than the contrived appearance of unanimity under the system of the single opinion. It is perhaps fitting that this essay should be dedicated to a judge who has, through his decision-making and his opinion-writing, caused many in his own country to deliberate on the function of the judiciary in a contemporary democracy. Though many may strongly disagree with his views, the way in which he has stimulated debate is of value in itself.

Considering the political role of judges

The choice of the appropriate function for the judiciary in a democracy is one which is dependent on a number of factors, cultural, economic and social, so that the institutions of each country will by no means be the same, even if they adhere to broadly the same general political philosophy. The diversity of judicial institutions among the liberal democratic states of Western Europe is indicative of this. Nevertheless, there are certain issues which liberal democratic states have to confront when considering the judicial function and it is with these, rather than any prescription of particular institutions, which the present essay is concerned.

One of the important issues which has to be considered is whether there is indeed a particular set of powers which is best handled by the judiciary and which distinguishes it from other branches of government. If the judiciary performs a task which is essentially similar to that of other branches of government, then approaches to its composition and the control of its use of power will be different from those where a distinguishing feature can be found. In this essay, I shall attempt to elaborate three models of the place of the judiciary in a democracy which provide differing answers to the question of whether the political function of the judiciary is essentially the same as that of other branches of government. The models discussed are not exhaustive of the possible roles which the judiciary can perform within a democracy, but they do isolate the major options presented in contemporary Anglo-American legal thought and, as such, they can provide a basis for further reflection oriented to the needs and traditions of a particular country.

Having expanded on the nature of the particular question around which this paper is centred, I shall seek to indicate the character of the response provided by each of the models and the political values on which each is based. In a final section, I will provide further reflections on what I consider to be the most constructive approach to the issue of the kind of political role which the judiciary plays. The critique offered of the models will be essentially theoretical, since this provides the best way of isolating the political issues involved. As such, it can provide the framework within which an empirical study of the judiciary in a particular country can be made.

The central issue

The idea that the judge should be "outside politics" is a familiar one in most legal traditions and is closely connected with the value of impartiality which is expected of an adjudicator. For example, in a recent case involving the removal of a Scottish judge because he appeared in judicial robes on posters in a campaign for Scottish Home Rule, a British Minister argued that, while a judge might even express his private opinions about a controversial matter, if he involved his judicial office in the controversy, this amounted to misbehaviour.[2] A similar view is reflected in judicial attitudes. Even where a court such as the short-lived National Industrial Relations Court or the Privy Council giving opinions on matters other than appeals from judicial decisions is involved in politically sensitive issues, the judges have maintained that their concern is only with "legal", and not with "political" issues.[3]

This denial of the label "political" as a description of the judicial function is motivated by a sense that there is something specific about it which separates it from the rest of government. Even in the task of resolving hard cases, it is considered that the creativity involved in the judicial function is distinguishable from that of other branches of government. It is on the question whether this claim can be substantiated that much of the jurisprudential debate on adjudication has centred, in recent years.

In the past it was claimed that "the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been laid down that such law is applicable",[4] and some judges today continue to assert that the role of the judge is simply to state the law as it is, not to conform it to what it ought to be.[5] On the other hand, other judges and commentators have long recognised that the common law was developed principally by the courts and that this function remains important today.[6] For example, one cannot ignore the way in which *Donoghue* v. *Stevenson*[7] and *High Trees*.[8] The denials of judicial law-making in the face of such facts of judicial practice sound rather naive. Yet, when one considers the matter more closely, taking account of the considerable learning and political experience of many of the proponents of this view, this initial judgment is a misunderstanding of what was being claimed. Rather than attributing to these judges a simplistic attitude to their function, it has to be recognised that the idea of the "non-political", uncreative judge, is based on political reflection and amounts to the assertion of a qualitative difference between the judicial and the legislative and executive tasks. The point is made perhaps most clearly by Sir Wilfred Greene M.R. (as he then was) earlier this century:

> . . . [I]n so far as a judge may be said to "make" law he does so in a sense so different from that in which the legislator makes law that the use of the same word for the two is highly misleading. I prefer to use the word "interpret".[9]

If such a qualitative difference can be substantiated, then it provides the basis for a distinct political function for judicial institutions.

The three models chosen for discussion here adopt different standpoints with regard to this claim of a qualitative, rather than a quantitative difference between the political creativity of the judiciary and that of other organs of government. The consensus model argues that the basis for the distinction lies in the kinds of values and issues which are appropriate for judicial decision-making. Whereas the resolution of controversial issues in society is best left to Parliament, the judges are limited to deciding basically non-controversial issues by the application of values over which there is a substantial degree of consensus in society. On the other hand, the interstitial legislator model suggests that there is no basic difference between the kinds of value choices made by the judiciary and those of other branches of government, at least in hard cases. Those limitations which do exist on judicial power concern merely the scope of the activity of courts. Accordingly, the political legitimation of judicial power in a democracy has to be treated on a similar footing to that of other governmental institutions. The rights model of Professor R. Dworkin situates itself between these two. On the one hand, he does not deny that judicial decisions can be radically controversial and unsupported by social consensus. On the other hand, however, he argues that there is a qualitative difference between the judicial and legislative functions in government, which is to be found in a distinction between questions of rights and those about the collective welfare. It is the way in which judges are confined to controversial questions of the former kind which substantiates the claim of a distinctive political role for the judiciary in government.

In terms of the creativity exercised by the judiciary, it may be said that there are three senses which can be given to the statement that judges "make" law. In a first, rather trite sense, judges may be said to "make" law when they formulate a rule in a way which has never been made explicit before. In every hard case, the judge has to exercise a creative choice between political values, but, as has been noted, this is not a sufficiently precise description to isolate the kind of political function which the judiciary performs. In a second sense, a judge may be said to "make" law when he has to choose between possible rules of law where there is no community consensus on what is an appropriate standard. The consensus model alone would deny that judges make law in this sense. In a third sense, judges may be said to "make" law in that they simply give effect to their own views of what is a good rule for society to adopt. Only the interstitial legislator model would accept that this is possible, while the consensus and rights theorists would deny it. The degree of political power involved in these senses is not the same and assessments of the judicial role in government will accordingly differ. In the discussion which follows, I will attempt to explain why it has been considered both possible and desirable to limit the kind of political creativity which the judges enjoy and to discuss the advantages and disadvantages of the theories concerned.

The consensus model

The consensus model is perhaps the most popular model for their role current among the English judiciary, though it also has support in other countries.[10] This model considers the judge as the spokesman for the community and its values, since it is in the name of society as a whole that he pronounces judgment. Whereas the judge has authority in a democracy to follow his "unbiased opinion, his mature judgment, his enlightened conscience", rather than simply following "opinion" in the country,[11] the judge has no such authority. Rather than give effect to his own opinion, he must give effect to those values which represent the consensus within the community. While the legislator can give effect to values which he hopes will come to be accepted by the community in the future, the judicial function is merely to keep legal standards in step with current social values.

One of the most vigorous proponents of this model in recent years, Lord Devlin, has argued that such a proposition for the judiciary is the one most consistent with the impartiality required of an adjudicator:

> In activist lawmaking the idea is taken from the consensus and demands at most sympathy from the lawmaker. In dynamic lawmaking the idea is created outside the consensus and, before it is formulated, it has to be propagated. This needs more than sympathy: it needs enthusiasm. Enthusiasm is not and cannot be a judicial virtue. It means taking sides and, if a judge takes sides on such issues as homosexuality and capital punishment, he loses the appearance of impartiality and quite possibly impartiality itself.[12]

This value of impartiality is supported principally by two considerations. Firstly, the institution of adjudication involves the resolution of conflicts within society through the judgment of an independent person. Its success relies on a reputation for even-handedness and this, it is argued, involves, in turn, that there should be no element of political partisanship in the decisions which are made. In extra-judicial conduct, this attitude is reflected in the convention, settled in the 1920s, that the Law Lords do not participate in legislative debates of the House of Lords on controversial party political subjects. However, it is the way in which the judges approach their judicial tasks which most effectively maintains the reputation of the adjudication process. Such a reputation for impartiality would be jeopardised if the values applied by the judges were too controversial. As Lord Devlin has argued,

> . . . [I]t can be said that there is room in the political process for criticism and even for healthy abuse of a law initiated by the government, while the efficiency of the judicial process requires that judgments should be immune from the sort of comment that is appropriate to the hustings.[13]

Secondly, this traditional concern for impartiality is justified today by the primary place of Parliament and democratically elected leaders in determining the direction which society ought to take. If the primary source of power in a democracy lies in the body of citizens, then they, either directly or through elected representatives, are the appropriate persons to decide whether existing laws or institutions are appropriate and which are the values to which they ought to give effect. Since the judges are not usually elected and, even if they are, they are not usually responsive to community pressures and criticism, it is not appropriate that they should take the kinds of decision required in controversial cases. Where there is a degree of agreement, then it might be acceptable that judges should develop the law to new circumstances, but in other cases the judges would have to give effect to their own opinions which are entitled to no greater weight than those of other citizens in a democracy. There is no reason for giving the judges a greater say in how society is governed, than to any other section of the community.

As a result of these considerations, it is appropriate for judges to eschew radical change and reform. The gradual extension and reform of the law in line with developments in social consensus does not amount simply to a quantitative reduction of the judicial role, but represents a qualitative limitation. However, for the theory to be plausible there are two major questions which have to be answered: (a) How does the judge establish what the "consensus" is? (b) Are the judges able to do this effectively?

If judges are thus not permitted to act on values which they expect citizens will come to accept in the future, the notion of "consensus" would seem confined to one of two senses, either the prevailing trend of public opinion or the fundamental values of society as illustrated in its institutions and laws, rather than in public opinion polls. If one considers the arguments of the model's proponents closely, it would seem that they generally favour the second interpretation. Rather than conceiving of the judges altering the law according to "the varying impulses of popular feeling", they have to look for "some more fundamental assessment of human values and the purposes of society".[14] This accords with the view that the function of the judiciary in society is to protect its fundamental structure, rather than altering it. Concepts such as the fair and reasonable man would seem in their view to represent a fundamental value of justice, rather than simply the views of the public at any one time. Opinions in the community are relevant to the extent that they represent considered judgments about what is fundamental. However, the considered judgments on which the judges base their decisions must represent a more consistent pattern of values than public opinion might display and take account of the values to which society is already committed in its social institutions.[15] The consensus which the judges try to determine represents those values which justify the existing social structures, both legal and non-legal, and on which society is based. Although it may not represent articulated public opinion at the time of the judgment, since the judicial decision is based on values to which people as citizens of the community are already in some way committed, it will be capable of commanding the general acceptance of society.

Such a view of consensus does not obviate the need for judges to be aware of current attitudes in the community. Values such as "reasonableness" or "immorality" require some recourse to contemporary attitudes and these may also be relevant where the precise import of the fundamental values is in doubt. As a result, even this clarification of the concept of "consensus" cannot resolve all the problems of how the judiciary can discover what is the consensus at a particular time.

Although consensus is to be established principally by reference to statutes, precedents and the political institutions of society, the judge also requires to be aware of social trends and attitudes to some extent and it is here that one of the main problems for the consensus model is to be found, particularly in a pluralistic society. In some cases evaluative questions about what can be described as "in the public interest" or "obscene" are left to a jury drawn at random from society and which might be expected to reflect current attitudes.[16] By contrast, judges are usually drawn from a relatively small section of society and are chosen mainly for their technical expertise in handling legal materials and questions, rather than for their representativity of different values in society.[17] In a pluralistic society, there is always a danger that leaving the determination of the "fundamental values of society" to a small section of the community will be unsatisfactory in that its experience and knowledge is too limited and biased. Though the same might be said of the sociological composition of the legislature or the executive,[18] they are not so immune from public pressure and accountability as is the judiciary. At least *prima facie*, it would seem paradoxical that such a narrow section of the community should be thought the spokesman of social consensus or majority opinion, except where its content had been explicitly laid out. Since there are so few institutional safeguards, there would seem to be a considerable chance that the judges will not reflect the real values of society.

Furthermore, in a pluralistic society, the kind of consensus which the judges are meant to reflect may not exist on the issues which come before the courts in some circumstances and the judges will inevitably have to rely on their own preferences. Since many modern democracies are made up of a plurality of groups each with their own value-systems, the consensus model can only succeed if it can show that there will almost always be a consensus view on the issues left for judicial determination and that the men chosen as judges are capable of reflecting it despite the character of many judicial appointments.

Even if these problems can be surmounted, it would seem somewhat questionable that the protection of confidence in judicial impartiality is of such a great value that it outweighs the potential for achieving substantive justice which might be provided by the allocation to judges of decision-making on some issues, even where there is no social consensus on the values to be applied. It is in the light of considerations such as these that the model of the interstitial legislator suggests that there is no essential difference between the role of the judge and that of other branches of government.

Interstitial legislator model

In contrast to the first model, that of the interstitial legislator considers the tasks of the judge and of the legislator to be essentially of the same character, though the former is subject to a number of restraints which do not affect the latter. Gény,[19] in particular, argued that the search for social consensus was illusory and that, even if it could be ascertained, the task of the judge was to adopt the best rule he could to serve the needs of the community. Where the legal sources of statute or precedent fail to provide the solution to a case, the judge, in the words of article 1(2) of the Swiss Civil Code 1907, should decide it "according to the rule which he would enact if he were legislator".[20] By acting in this way, he does not perform a task which is qualitatively different from that of other branches of government.

This view in continental legal philosophy finds a parallel in the American Realist movement. As Holmes J. put it, judges do and must legislate, "but they can do so only interstitially; they are confined from molar to molecular motions".[21] Like the work of Gény, Realism sought both to make the judges aware of the character of the tasks they had to perform and to encourage more efficient methods of achieving the best results. This concern of Realist writers such as Llewellyn with improving the performance of the judiciary in their lawmaking seems to take for granted that the tasks of the judge and the legislator are essentially the same, to find the best rule to govern the relations in question.[22]

Legal positivists have also embraced this position. Their view is perhaps most clearly argued in Dr. Raz's recent discussion, 'Law and Value in Adjudication'.[23] In it he distinguishes between "regulated disputes" where the legal materials provide an answer without the need for the exercise of judicial discretion and "unregulated disputes" where they do not. In the latter situations, the courts act in the same way that a legislator would in adopting the rule which they think best within the limited range of options which is permissible for judicial lawmaking. Indeed, he points out that the judges themselves recognise that they are often performing a task which could be performed by Parliament. As a result, the judge can adopt a solution with which the majority in society will disagree.

Despite the emphasis on the essential similarity with the other functions of government, authors proposing this model have often been quick to point out the limitations within which the judge exercises his choice. Llewellyn in particular emphasised the way the traditions and crafts of the legal profession shaped the way in which the judge approached his tasks and the kinds of discretion which were thought acceptable by the legal community.[24] The judge seeks to make sense of the precedents and statutes within the context of the legal tradition of the country and cannot radically depart from it. The obligation to justify the decision within that context effectively limits the scope for the judge giving effect to his own opinions. Equally, judicial reform is partial in that the legislative power of judges only operates within the area which comes to them for decision in a particular case and the uncertainty which such partial legislation may introduce into the rest of the law may dissuade the judges from acting. Wide-ranging change is generally considered appropriate to collective decision-making alone. Therefore, although the judges may start out with the same values as the legislators, they will not necessarily make the same decision, because of the limitations within which they operate. Nevertheless, the individual judge is able to make his own personal contribution to the law and this has, indeed, been taken as the hallmark of a leading judge.

Such a view of the judicial role maintains the primacy of Parliament as the institution for social reform in a democracy, but allows greater freedom to the judges in developing the law and in exercising discretionary power. The political justification for such a role comes from a recognition of the practical limitations on the work of the legislature in a modern democracy. The increase in State intervention which liberal democracies have witnessed this century has increased the burdens on legislative institutions and they have found it necessary to hive off much lawmaking to the executive by way of delegated legislation. (Indeed, the Constitution of the French Fifth Republic has gone so far as to say that it is the legislature, not the executive, which enjoys limited lawmaking powers, residuary power resting in the executive.[25]) In many hard cases, the judges have to make some decisions and must necessarily make up their own minds as to what is an appropriate rule. The increasing pressure on the legislative timetable has meant that it is no longer realistic to expect Parliament to supply all the necessary reforms and to handle all the questions of the collective welfare which need to be decided. Although reform may involve delicate value-judgments which may not reflect a consensus in society, the results of judicial abstinence would seem a worse state of affairs and for that reason the judges are permitted to act in limited areas on their own views of what is best for society.[26] For similar reasons, the courts in many countries have been entrusted with greater powers to judge the "reasonableness" of contractual terms or to control them on the basis of the "public interest".[27] Hiving off such decisions to the judiciary would seem no worse for democratic accountability than giving them to "quangos" (quasi-autonomous, non-governmental organisations) and the reputation of the judiciary for even-handedness and for considered judgment may make their resolution of issues more acceptable. While the result may seem, from a theoretical point of view, undemocratic, it would be argued that the allocation of power within the State has to be made in a pragmatic manner in order to achieve the substantive goals of a particular society. The procedure of adjudication is but one social institution and its function has to be seen in the context of the possibilities which other institutions offer for achieving the aims of society.

Apart from this conflict with democratic theory, the model also conflicts with the frequent assertions by judges that their decisions are not simply based on their own views of what is the best solution to adopt. As Lord Wright put it:

> While it is true that a judge is entitled to have and even to state on proper occasions his personal opinions on questions of the public interest, it is a different matter if he claims to base his judicial opinions on his personal opinions.[28]

Although they would accept that different judges may reach different decisions on the same subject-matter, they would argue that the judge is neither empowered nor attempts simply to give effect to his own opinion of the best solution.

The conceptual critique which they would offer this model concerns whether judges and legislators acting on "what they think best" are really making the same kind of judgment. Betti argued that all interpretation of legal materials in hard cases is creative in that it involve a judgment by the judge about the way in which they ought to be interpreted and that more than one point of view can exist on this.[29] However, he considered the real question to be "whether this is an act of free creation, free, spontaneous and, in this sense, arbitrary, or whether it is rather as much subordinated and bound to the totality of the legal system, the organic body of norms, as to the demands of the social environment and the relations in question."[30] Like the judges, he pointed to a difference between giving effect to one's own opinion of what is best and giving effect to what one considers, from the point of view of the legal system, is best for society. There is no necessary correlation between the judge's answer from the first perspective and that from the second. As a matter of judicial psychology, it may be that a judge will be reluctant to interpret the values promoted by the legal system in a way which radically differs from his own opinions of what is right, but this does not imply that he is setting out to give effect to his own opinions, whereas the legislator clearly does. Although the individual judge will undoubtedly make his personal contribution to the development of the law, he does so from a different perspective from that of the legislator. Rather than the judge, having exhausted the legal materials, laying aside his books and acting on his own opinions, the description given by Betti suggests that there is more of a creative continuity between applying the settled legal rules and making judgments in hard cases. The model of the interstitial legislator could, then, be criticised for failing to distinguish these two senses of doing "what he thinks best" in the circumstances.

However, even if the distinction were accepted, the proponents of the model would still wish to argue that this does not really establish a qualitative difference between the judicial and legislative roles. A delegated legislator also has to take his decisions with the aim of giving effect to the purposes for which the power was granted. It must be exercised genuinely within the perspective of the empowering legislation and not for some other purpose, however laudable, which the decision-maker wishes to effect. It may well be that the breadth of discretion permitted to Ministers is greater than judges enjoy, but both have to make decisions from a given perspective, rather than on the basis of their own unfettered opinion. If the only import of the distinction Betti draws is between limited and unlimited discretion, it does not seem to capture the kind of qualitative distinction which many have wanted to support.

The acceptability of the theory rests principally on considerations of a political character. Leaving the litigants at the mercy of the views of individual judges about what is the best solution may make decisions less predictable. Equally, if judges enjoy a similar kind of political power to other organs of government, it has to be asked why they are not subject to the same controls. Clearly, if the degree of power which this model permits to the judiciary is acceptable in the service of the overriding goals of society, then questions would have to be posed about the method of selecting judges and the character of those selected, questions which, in many countries, are not thought appropriate ones to be asked.

Rights model

It is in the light of these difficulties with the approach to the judicial role offered by the interstitial legislator model that Professor Dworkin has recently attempted to explain the sense which judges and others have that the judicial role is qualitatively different from that of the parliamentarian or the minister. People do expect judges to offer different kinds of justifications for their decisions and complaints are made when it is considered that they are not doing so. It is this sense of uneaseness at the equation of the judicial and legislative roles which Dworkin has tried to articulate through a model which differs substantially from that of the consensus theory. He argues that judges are concerned with issues about the rights people have and that such issues are different in kind from questions of the collective welfare with which alone the legislature and the executive are concerned.

Dworkin considers that the debate between the two models of the judicial function just outlined is too crude and fails to take account of an important distinction between arguments of political "principle" that appeal to the political rights of individuals and arguments of political "policy" which claim that a particular decision will promote some conception of the collective welfare. He considers that judges should rest their judgments in controversial cases on the former kind of ground. In this way he seeks to present a model which is less limited than that of the consensus theorists, while more restrictive than that of the interstitial legislator.[31]

The reasons for distinguishing between issues of individual rights and those of the collective welfare, in Dworkin's view, lies at the heart of liberal political theory.[32] In his view, society aims to provide the individual with the maximum freedom to pursue his own plan of life. In our pluralistic society, people have different values and tastes and, consequently, different ideas of what makes for the good life. The resources available in society should be divided in a way which treats each of these life-plans as equally valuable. If it were simply left to the State to decide what people should receive, those in power could impose their ideas about what was a worthwhile plan of life and distribute resources accordingly. To avoid this, resources are allocated in two ways. For many resources there is a free market where goods go to the highest bidder. If people want something very much for their plan of life, they will be willing to pay a correspondingly high price for it. Secondly, where this method is not feasible, for example in determining methods of collective defence, then the policy of treating people as equals is pursued by making the decision through an organ of collective decision-making in choosing which each individual has one vote. This body will decide on priorities according to the strength of demand in the community.

However, such procedures could work injustice. The market takes no account of the special needs of certain individuals, such as the handicapped, who may require a greater share of social resources to achieve the same degree of satisfaction in their life-plan as others and it does not compensate for inequalities of wealth. This potential for injustice is rectified by the creation of economic and social rights to minimum levels of housing, wages, education and the like. Collective decision-making may also work injustice in that it is possible that individuals will vote not merely according to what they want for themselves, but also according to whether they approve of the activities of other groups who stand to benefit from a particular decision. For example, an individual may be indifferent whether swimming baths are built in a particular part of his town, but may vote against the proposal simply because, given the locality in which it is to be situated, a certain race or nationality group of whom he disapproves will be the principal beneficiaries. On more important issues, the result of decisions based on such "external preferences" could be serious, particularly if a minority were regularly the victims of such discrimination. Accordingly, political rights are created to ensure that in important areas of life, people will have the basic freedoms to pursue their plan of life. Rights are, therefore, limitations on the procedures of collective resource allocation. The freedom of the individual depends on them being protected against the operation of collective decision-making and so the tasks are given to different bodies within the State: collective decisions about what is best for society to the free market and to the legislature, and decisions about rights to the courts.

Although this scheme may appear at first simply limited to constitutional or fundamental rights, it is also applicable to derivative rights granted by common law or statute. If these give an individual a right to do something, such as to drive down a particular street, then the right should be protected until it is abrogated by the appropriate collective decision-making procedure. This may be so, even if it were against the welfare of the community as a whole to do so, such as if it had a detrimental effect on the foundations of a particularly important historic building. Rights protect individual autonomy against the demands of the collective welfare.

Dworkin argues that this distinction between questions of rights and those of the collective welfare can be summarised into two kinds of reasons which may be offered for a decision:

> Arguments of principle attempt to justify a political decision that benefits some person or group by showing that the person or group has a right to the benefit. Arguments of policy attempt to justify a decision by showing that, in spite of the fact that those who are benefited do not have a right to the benefit, providing the benefit will advance a collective goal of the community.[33]

Judges are confined to questions of "principle", while the executive and the legislature may justify themselves by arguments of "policy". To take an example, where a factory is polluting the atmosphere to the detriment of neighbouring landowners, the judges are to resolve a nuisance action against it by considering the respective rights of the neighbours and the factory owner and not by asking which solution to the dispute would be most beneficial to the balance of payments or would ease unemployment in the area. The consequences for third parties affected may be relevant, but this does not mean that the courts simply have to consider what is beneficial for the community as a whole. That the reduction of pollution would be so expensive for the factory owner as to drive him out of business and so creating serious unemployment could be considered by a court. However, it operates only as one element in the calculation of the rights of the parties — does the neighbour have such a strong right to clean air that he can drive the factory owner out of business with all the attendant consequences? This kind of calculation appeals to our beliefs about the strength of the rights in question and not purely to what will most benefit the community.[34]

The procedure of determining rights in hard cases within Dworkin's theory requires the judge to work out a coherent political morality which justifies the rules and principles of the legal system. This "institutional morality", "the political morality presupposed by the laws and institutions of the community",[35] is then applied in the resolution of the case. In deciding between competing conceptions of the institutional morality, reference may be had to moral views in the community, but this is only to clarify what is the community institutional morality. Essentially, then, the judicial function involves recognising and applying the values which are inherent in the legal order, but which have not been fully expressed in the legal texts.[36] This differs from the approach of the consensus model in that the interpretation given by the court need not necessarily find support in the views of the community and may, in fact, be radically different from what people in society consider correct.

This institutional separation is justified by Dworkin with two arguments.[37] Firstly, since decisions about the collective welfare involve compromises between individual goals, and the right balance is almost impossible to establish from an objective point of view, then the proper way of making such decisions in a democracy is through collective decision-making processes and not by the decision of a non-elected judge. The democratic process constitutes a kind of "black box" into which the conflicting goals are fed and the result is accepted, as representing the best available formulation of the public interest. Adjudication is simply the wrong box into which to feed the issues. Secondly, it is thought wrong that the rights of an individual should be sacrificed by the application of a new duty created after the event to his case, even if this proves collectively beneficial. The retrospective character of judicial law-making makes it unfair to use adjudication to make decision of this kind.

However, the Dworkinian model can be criticised both from a conceptual and a political point of view. From the conceptual point of view, it has to be asked whether one can in practice separate clearly issues of rights from those of the collective welfare. Dworkin freely admits that the impact of a decision on the community may feature in a discussion of rights, though the final outcome is determined by considerations of "principle", rather than by "policy" of what is best for the community. For example, in the case of the polluting factory, the potential unemployment caused by its closure is merely considered to test whether the rights of the neighbours to clean air are really as strong as they claim.[38] Dworkin is adamant that such considerations of the consequences of a decision should be clearly distinguished from decisions based on the collective welfare alone. The distinction between "principles" and "policy" is concerned with the kinds of questions with which a decision-maker may be concerned, rather than with the kinds of fact which may feature in his justification:

> If an argument is intended to answer the question of whether or not some party has a right to a political act or decision, then the argument is an argument of principle, even though the argument is thoroughly consequentialist in its detail.[39]

To deny the rights of the neighbours in the factory case is not to decide the issue on the basis of the collective welfare, but on the ground that they have failed to make out a sufficiently strong moral claim to what they request.[40]

Nevertheless, this explanation which Dworkin gives is somewhat problematic. The reasoning in these consequentialist arguments is made up of three parts. Firstly, there is a *prima facie* right established from the institutional morality. Secondly, the judge has to decide if this right would have detrimental effects on the community. In some cases, the rights of third parties will be affected and the issue becomes one of balancing rights. In others as with the factory, he will have to come to a conclusion about what is beneficial or detrimental to the welfare of the community before he can test out the right. Thirdly, the judge has to come to a conclusion about the rights which the institutional morality does support, all things considered. To say that rights may be limited in the light of considerations about the public welfare, requires the judges to make up their own mind about what is in the public interest and yet this is something which Dworkin suggests they are institutionally incapable of doing.

The same criticism applies *a fortiori* to the instances in modern legislation, such as the British Restrictive Trade Practices Act 1976, where the parties only have rights under an agreement if it is found to be "in the public interest". Such laws would seem to encourage the judges to base their decisions unequivocally or considerations of the collective welfare. Such an attitude to rights reflects a view that it is only through improvements in collective welfare that individual rights can have any meaning and that the dichotomy between the two which Dworkin describes is exaggerated and does not fit the situation of a modern State.

No doubt, Dworkin would be able to point out that the statutes or judicial practices enabling the courts to consider the "public interest" limit the factors which the court may take into account in making its decision. For example, the "public interest" with which the court is concerned under the Restrictive Trade Practices Act, 1976 is confined to a list of specified factors and only concerns the welfare of the community when viewed from the perspective of the members and consumers of a particular industry.[41] The court is not encouraged to develop a wide-ranging economic strategy of its own. The courts would not, then, seem to be concerned with unrestricted considerations of what is best for the community as a whole. Those considerations called ones of the "public interest" are really only partial perspectives and do not really deal with the collective welfare question of what is beneficial to the community as a whole. However, even if the Dworkinian theory could be defended in this way, it would be subject to the same difficulties as the ideas of Betti discussed earlier. How much of the "public interest" must one be able to determine before one has a genuine decision to make about the "collective welfare of the community as a whole"? At most there would seem to be a sliding scale with no point of cleavage to justify the attribution of a qualitative difference between the judicial and legislative functions.

Even if one were to accept the distinction between issues of rights and those of the collective welfare, it does not necessarily follow that one is bound to accept the institutional separation between the competences of the judiciary and the other branches of government. The constitutional success of the Dworkinian theory presupposes that the conceptual separation between "rights" and "collective welfare" questions is mirrored in the institutional competences of the various branches of government. But this is not necessarily the case. For example, in Britain there have been pressures in recent years for a Bill of Rights to entrench certain fundamental claims which individuals have against the State and the majority in society.[42] However, this has drawn criticism on the ground that the function which this would give to the judiciary is inappropriate in the British context. It has been argued that to protect rights in this way would be to take vital questions out of the mainstream of politics and entrust them to judges.[43] Indeed, the absence of a constitutional court with power to strike down legislation which violates fundamental rights shows the degree to which, at present, the primary place for the protection of rights lies with the conscience of the collective decision-makers. A free press and lobbying of Members of Parliament are the principal ways in which rights are protected, though the judges do limit the way rights can be invaded to some small degree by the use of presumptions in statutory interpretation. Although the rhetoric of political debate and the adherence to Conventions on Human Rights show the importance of rights within the political structures of Britain, the institutional structures of political life do not clearly reflect this in the way Dworkin suggests. The principal organ for collective decision-making is also the principal forum for the protection of fundamental rights.

The political disadvantages of an uncontrolled élite acting as the benevolent guardians of the rights of individuals may outweigh the advantages which Dworkin offers. Antipathy to the rule of judges, which finds one of its strongest expressions in the French Revolutionary legislation preventing the judges from interfering with the executive and from giving regulatory decisions,[44] finds echoes in other countries and many judge's are aware of this.[45] The mistrust which Dworkin seems to have of legislative institutions would be matched, if not surpassed, by the mistrust many feel towards the judges. No doubt, Dworkin is right to point out that we can change the character of the judiciary if we mistrust it.[46] However, the very independence and uncontrollability of the judges which enable them to protect individual rights against erosion in the name of the collective welfare may also enable them to continue as a barrier to genuine social improvement upon which the effective value of rights, even for entrenched minorities, ultimately depends.

On the other hand, it could be said that the Dworkinian role for the judiciary is too limited in other respects and that adjudication might have a valuable contribution to make to the life of the nation by deciding issues other than those of rights. The suitability of adjudication as a forum for deciding some issues of collective welfare has been justified on the ground that many such decisions have to be taken at an individual level and, given the pressures on legislative and administrative time, suitably modified court procedures might be the best available institution of government for deciding them.[47] Once the legislature has set out the general strategy, the detailed and specific decisions about the demands of the public interest could be left to others.

It may appear paradoxical to deny a qualitatively distinct role to the judiciary and yet to permit judges to handle some important questions of public interest. However, this can be resolved by recognising that, having removed the idea of a qualitative difference between judges and others, the allocation of functions within government can then be decided on grounds of convenience at a particular time and may be redistributed should the judges prove unsatisfactory. There would be no question of the kind of inherent jurisdiction which Dworkin's model would give to the judges.

If one can straighten out some of the conceptual difficulties of the theory, there remains thus an important political question of the acceptability of judicial power and it is likely that different countries within the same political system would wish to give different answers in the light of their social and political institutions and traditions.

The political role of the judge

The conceptual difficulties of the consensus and Dworkinian models would suggest that there are considerable problems in giving coherent expression to the sense which many feel that the political function of the judge is somehow of a distinct character from that of the other branches of government. Nonetheless, this feeling remains deeply entrenched and there is often considerable uneasiness with the equation of the judiciary with the other elements in the political life of the State. The resolution of this tension cannot be achieved simply by a more subtle conceptual structure in a model of the judicial function, but requires much more a political discussion of the degree of power which it is acceptable for the judiciary to wield in a particular society. Nevertheless, despite their conceptual inadequacies, the three models outlined here do attempt to provide differing strategies for the division of power between the institutions of government. In this final section, I want to suggest that the model of the interstitial legislator can be suitably modified to take account of the insights of the other two models and most successfully brings out the kind of political discussion which is necessary of the proper role of the judiciary.

The consensus model achieves its qualitative separation of the judiciary from the rest of government by a radical reduction in the contribution which the courts can make to the resolution of controversial social issues. As a result, a heavy burden for deciding such issues falls on other institutions. The broblems of overload on these other bodies may make such a function for the judiciary less than satisfactory. The flexible approach to the division of governmental functions of the interstitial legislator model has many advantages over that narrow approach to the potential role of the judiciary and over the rather uncontrollable inherent jurisdiction which Dworkin would wish to give it. Although the price of this flexibility is the danger that individual rights might be placed more at risk, it does enable the judges to participate more in the activity of government where the need arises, though always on a revisable basis. In that the role of the judiciary is thus not fixed irrevocably, the political issues involved in its function at a particular time remain very much in the foreground.

Although this approach does compromise the traditional learning on the separation of powers to some extent, the value behind it of avoiding too great an accumulation of power in the hands of one group is not necessarily infringed. Nevertheless, it is necessary to recognise the limits on the flexibility of the judicial function. Since the bulk of judicial work is the resolution of easy cases where the principal issue concerns the ascertainment of facts, the effective performance of this task must be protected. Confidence in the impartiality of judicial institutions has to be maintained so that disputes will be submitted to them. Equally, it is important that the decisions are consistent in order that individuals can plan their lives within the framework of the law and so avoid the occurrence of disputes. Where decisions are based on the controversial opinions of the judges, who may disagree among themselves, both of these objectives may be impaired. Furthermore, as the consensus model indicates, the avoidance of controversy is intended to further participation by the community in the resolution of controversial questions. The resolution of issues by experts, especially those who are not directly accountable to the community, can only be an exceptional measure in a democracy and must be carefully scrutinised.

The limitation which the Dworkinian theory emphasises relates to the character of the process of adjudication. In adjudication, the plaintiff is claiming an entitlement to what he asks whereas in other governmental processes, such as licensing applications, he is merely requesting a privilege which the decision-maker is at liberty to refuse him. In Western political thought, entitlements provide the individual with a certain sphere of action under his control. In more collectivist countries, the emphasis is on rights as policy pronouncements and the task of the court is to further the collective interest by adapting individual relations in an appropriate manner.[48] In a modern State where the individualistic character of entitlement has been tempered by concern for the community, the sphere of individual control has been much reduced. Nevertheless, the choice of the entitlement framework of adjudication, rather than the privilege framework of administrative or legislative decision, represents a willingness to limit the degree and nature of the communitarian considerations which enter into the resolution of controversial issues. It is this entitlement approach which determines the structure of the process of adjudication for the resolution of easy cases and may make it an unsuitable process for deciding many controversial issues, particularly of a wide-ranging nature involving many sections of the community. The special status which entitlement gives to particular persons may be inappropriate to many issues and this may hinder their effective resolution. Alternative procedures may be more satisfactory in presenting the issues and in allowing the most socially beneficial solution to be reached. To be sure, judicial procedures can be effectively modified to permit a wider range of parties and arguments to be brought before the courts. However, there are limits to the kinds of modification which can be introduced, especially in view of the primary function of such procedures in the resolution of easy cases. Furthermore, these have also to be considered in the light of the extent to which it is acceptable to turn adjudication into a forum for bargaining between social groups.

In these ways it is possible to accommodate many of the limitations which the consensus and Dworkinian models consider appropriate to the judicial function without having to find a particular characteristic which substantially distinguishes adjudication from other branches of government. This way of considering the judicial role recognises that the judges have a more limited political creativity than other branches of government and, to this extent, it is able to accommodate much of the sense which judges and others have expressed of a substantial difference between them, without elevating the distinction into a qualitative difference. Nevertheless, viewed in this way, questions about the political character of the judicial function cannot be avoided, so that open discussion of them is fostered.

Conclusion

Whichever of the models is chosen, though especially if, as I have suggested, it is best to consider that there is no qualitative difference between the judicial and other roles in government, it must be recognised that the judiciary has a specific political function for which more than technical legal ability is required. Even the idea of the "unpolitical judge" has to be understood as an appeal to the judge to play a distinctive political role within the State. Although the judge may be required to distance himself to some extent from many of the party political controversies which surround the government of the State, in exercising the kind of creative power which is required in hard cases, the judge has to be aware of the political premises on which he bases his decision. Such an awareness should lead the judge to consider more carefully the political choices with which he is confronted.

Although such an awareness could come as a result of initiatives by the judges themselves, there are also strong arguments for institutionally securing it. This could be achieved in at least two ways. Firstly, judicial procedures could be modified, notably with regard to the range of persons who can participate in a case or present their views. By extending the debate beyond the usual restricted classes of litigants, those directly concerned in a particular dispute, the political implications for society as a whole are more likely to come to the surface. Secondly, the appointment of judges could more clearly reflect the political ability and skill which is expected of them in handling hard cases. A more explicit concentration on these factors could ensure that the values which the judges carry into law are those which are acceptable in society and in that way some control is maintained over the idiosyncracies of individual judges.

The nature and character of such reforms require far more discussion than could be attempted here. At best, these points, together with the issues involved in the choice between the various models of the judicial function, may be useful topics in the much-needed discussion of the place of the judiciary in the government of contemporary democracies.

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43. Griffith, 'The Political Constitution' (1979) 42 *M.L.R.* 1, 16; *cf.*, Wade, *Constitutional Fundamentals* (1980), 75-9.
44. See Vanderlinden, 'Some Reflections on the Law-Making Powers of the French Judiciary' [1968] *Jur. Rev.* 1.
45. *E.g.*, Devlin, 'Judges and Lawmakers' (1976) 39 *M.L.R.* 1, 16.
46. 'Political Judges and the Rule of Law' *supra*, note 31 at 282-4.
47. See Chayes, 'The Role of the Judge in Public Law Litigation', (1976) 89 *Harv.L.Rev.* 1281; King, 'Overload: Problems of Governing in the 1970s' (1975) 23 *Political Studies* 284.
48. See Margovits, 'Socialists v. Bourgeois Rights: An East-West German Comparison' (1978) 45 *U.Chi.L.Rev.* 612.

5

THE ARTIFICIAL REASON AND JUDGMENT OF THE LAW*

NEIL McCORMICK

1

It is a very great pleasure to be asked to join in paying tribute to Justice Krishna Iyer, who has given such signal service to his country and to the legal tradition of the common law world. That tradition, both in pure cases and in mixed systems such as that of Scotland, seems to me to depend greatly upon respect of reasoned argument in the determination of controversies. It therefore seems appropriate to dedicate this paper to examining some of the main elements of legal argument as these manifest themselves in the legal systems with which I am most familiar.

The first point to make, by no means an original one, is that the function of legal argument is one of *justification*.[1] The lawyer arguing in court has to justify his client's claim, or his client's defence. The judge has to justify his decision. The justification offered, '*motivation*' as French lawyers might say, must show that the claim or the defence or the decision is justified as a legal decision. The question is how we can justify such things at law. How are we able to tell what counts as a good justification?

What seems obvious is that the criteria of a good or sound justification must be themselves normative criteria. They are criteria for appraisal and judgment of arguments, and thus also guides in the formation of arguments. Yet these are, on the whole, normally implicit rather than explicit normative criteria. It is by learning how to make and appraise an argument that we in effect master the relevant criteria. In this realm, I take it that a function of the legal theorist is to try to make explicit the criteria of good argumentation.

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That at once raises the whole question of relativism. Plainly in learning how to make what counts as a good argument for a decision or a claim in Scots law or in English law or in the law of India, I am learning how to work within a set of operative customary norms prevalent among lawyers and judges in England or Scotland or India as the case may be. There is, therefore, no compelling or necessary reason to suppose that the norms will be the same. Indeed, we know perfectly well that they can quite readily be different. Being regrettably inexpert in the modern jurisprudence of the Indian Courts, I shall not comment on their practice in the main body of my argument. But I only have to read French, German, English, Scottish and United States Supreme Court Law Reports to notice that in different places, and in the same place at different times, different styles and practices of argumentation are in play. There are differences as to the explicitness of the reasons given. There are differences on the question whether dissenting opinions are made available to the public or not. There are also, and this has important consequences, differences in practice as to the degree to which arguments before courts take place as oral arguments (common in Britain) or are largely supplanted by written briefs (common in the United States, and, in a different way, in continental Europe, I believe). Some of the elements of legal reasoning seem thus on the face of it to be quite plainly a matter of mere convention, not fixed by 'the nature of things'. Legal reasoning is perhaps a form of artificial rather than natural reasoning.

It is by no means a new view that there may be at least artificial elements in the criteria of good legal reasoning. The very title which I have chosen for this paper derives indeed from remarks made by a Chief Justice of England, Sir Edward Coke, to King James who, having arrived from Scotland full of the lore of natural law, had on one occasion indicated his readiness to decide litigation himself. Sir Edward Coke in the context 'greatly offended' the king by arguing that kings no longer had power to do their own judging in England.[2]

> The King in his own person cannot adjudge any case . . . but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England . . . true it was that God endowed His Majesty with excellent science, and great

> endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgement of law, which law is an art which requires long study and experience, before that a man can attain to the cognisance of it.

'The artificial reason and judgement of the law' — my title, you see, comes from Sir Edward Coke's argument. But how artificial is the reason and judgement of the law? Are there no limits to the modes of reasoning available to lawyers? Are there no universals, but only locals and particulars?

If we take Coke's own argument, it would seem that the key point is that law is an art requiring long study and experience. Certainly, one must admit that he has a point. The law of property, the law of taxation, the law of inheritance, all branches of law, vary greatly at least in their details between legal systems, even similar legal systems belonging to the same state, as for example, between England and Scotland. Nor does one have to be a great comparative lawyer to make the same point with even more force among the various countries of Northern and Western Europe alone. Certainly, to master the legal system of any particular country is a long and time-consuming task. You cannot give good backing for any legal claim or defence or decision unless you know the relevant law. And knowing the relevant law calls for considerable learning. And the learning is differently conducted in the different law schools of the different jurisdictions. For that reason alone, we can certainly agree with Chief Justice Coke that it would be intolerable for people simply to arrive in courts anywhere and purport to determine cases according to unaided natural reason.

This may lead to a certain sort of relativism, but not a very surprising kind of relativism. Since the law of succession in Scotland, England, Germany and France is in each case different from every other, it follows that the right decision in disputed — or undisputed — matters of succession within these different laws will be different even in cases presenting similar facts. The justifiable decision will be different, for the justification at law for decisions in such cases will depend upon what the law is.

But that does not show that the *method* of reasoning or of argumentation differs. It shows that the premises may be different, in so far as the rules of law form the premises for legal arguments. Yet it is in content, not in form, that they differ. It seems necessary to accept the widely held view[3] that legal rules can be cast in the canonical form *if p* then *q*. *If certain circumstances obtain, then the legal consequence is so and so. If a person dies intestate, then his children shall have right to his estate.*[4] Thus, to establish the right of some three siblings to hold this estate in equal shares, it will be sufficient to establish that they are children of a father who has died intestate possessed of this estate. The process is a straight-forward one of deductive logic.

It is sometimes[5] suggested that deduction is inappropriate to common law systems. Such an example as the one I have just given demonstrates the falsity of this. One can give more elaborate and detailed concrete examples, showing how a whole chain of legal reasoning in an English case based on Statute Law can be set into perfect deductive form, using *modus ponens*.[6] It would be tedious to repeat this demonstration here. But in this respect it is a gross exaggeration — indeed a total untruth — to suggest that the Anglo-American common law is in any degree less 'logical' or 'deductive' than any other system anywhere else.

Some would say perhaps that English law is not logical as, say, the French law is; Englishmen lack that Cartesian style or cast of mind upon which Frenchmen pride themselves — the conviction that every principle must be carried to its logical conclusion. Contrast the Englishman's pragmatic readiness to make common sense exception to any principle, his habit of working from case to case in an inductive way.

That there are here differences of national style, tradition and canons of argumentative elegance need not be disputed, though we are probably apt to overdo reliance on such national stereotypes. But the existence of such differences, so far as they do exist, has nothing — nothing at all — to do with acceptance or rejection of *modus ponens* or its equivalent the *Barbara* form of the categorical syllogism. So far as legal systems include rules which it is mandatory to apply in every case to which they clearly refer, observance of the requirements of deductive logic is a necessary element in legal justification. That is an analytic truth.

What is neither analytic nor self evident is that it is desirable to have legal procedures which are rational in the minimal sense that they avoid the self contradiction and incoherence inherent in disregard for deductive logic. But in my submission such rationality is desirable. (And sociologically, I find adherence to this value much more widespread in place and time than Max Weber[7] appears to suggest in relation to his ideal type of logically formal rationality).

In terms of my present inquiry, I venture to assert that all the legal systems of every country represented at this symposium include among the criteria of good argumentation a ban upon breach of the requirements of deductive logic. This is so even though the premises from which argument commences are different in content legal system by legal system. Of course, these premises being the rules and other norms of a legal system, they have different content in different places and at different times. Of course attitudes as to their desirable formulation and application can vary. Those of 'Cartesian' cast of mind may favour the greatest possible generality of principles, the fewest possible exceptions thereto and the least possible willingness to admit of exception to principles elegantly arranged and few in number. Those of more 'pragmatic' disposition may take a less grand view and favour proceeding more cautiously case by case, never generalising a principle further than present need, always distrusting the pursuit of any principle to its ostensibly 'logical' conclusion.

But these 'logical' conclusions have nothing to do with technical 'logic'. This usage of the term 'logic' is colloquial — and utterly unobjectionable so long as we do not deceive ourselves into treating it as though it were not wholly different from our technical usage.

II

But what of this point I have made — have made twice — about those of us who reason case by case? All very well, it may be said, Common lawyers faced with statutes have to argue deductively, cannot avoid *modus ponens*. But the real glory of the common law is case law, precedent, *stare decisis*, the learned custom of the courts.

To my way of seeing it, however, the difference between statute law and case law is one of degree not of kind — there is a difference in the degree to which clear rules of mandatory application are extractable from cases as against statutes. But the rule once extracted is as much or as little of the form *if p then q* as any enacted law. And so the possibility of deductive logic in justification exists in this case too. Here is not the material for grand distinction.

What makes it possible — what makes it *conceivable* — that one might get rules out of cases at all? My answer to that is that making and justifying a decision in a given case involves one in the necessity of making some ruling on a point which is or might be in dispute in that case. This is most obvious and most important in those cases in which the law itself or its interpretation is under dispute. For example, it may be under argument whether a dead man should be deemed to have died intestate in respect of all or part of his estate, the case being that he died at the hand of a beneficiary indecently hasty to succeed under his will, or to forestall a change in the provisions of the will. (Such facts being at stake in Ronald Dworkin's[8] celebrated example of reasoning from principle, the New York case of *Riggs* v. *Palmer*.[9]

Whatever a court decides in such a case, it seems plain that the deciding court must be ready to make some ruling on the matter in hand. A purely *ad hoc* decision against (or for) *this* beneficiary would be unsatisfactory. The question, properly, is whether a beneficiary, *any* beneficiary, may or may not succeed to a bequest under the will of a person he has murdered. That question must be answered. A *ruling* must be given. Justifying the particular decision involves universalizing it. And the same goes for justifying a claim or a defence :

Stage 1: 'I claim my rights under this will.'
'You have forfeited them because you murdered the testator in order to inherit.'
Stage 2: 'No. The will is valid whether or not I murdered the testator, so the will must be enforced in my favour.'
'On the contrary. The will even though formally valid ought to be set aside in your case since you murdered the testator.'
Stage 3: 'If a will is formally valid, it ought in any case to be put into effect, regardless of other circumstances.'
'At least if a beneficiary under a will has murdered the testator, the will ought not to be put into effect in favour of the murderer regardless of its formal validity.'

Each side has to show that it seeks not some act of particular grace, but instead seeks what is right in the circumstances. But what is right in the circumstances is right for any such circumstances. What one propounds as a *justified* claim one propounds as calling for satisfaction whoever makes it whenever the circumstances are materially similar given the description one has put upon them.

R. M. Hare[10] and his followers would perhaps contend that this is because of the logical properties of terms like 'ought', 'right' and so forth. I am not certain of that. Rather, what seems to me to be at stake is a particular conception of the requirements of formal justice. One who has to do *justice* among other persons, and one who seeks this or that as a matter of *justice*, is committed at least to the principle that like cases are to be treated alike and differences of treatment to be grounded in difference of relevant factors in a situation. In so far as we have reason to wish that our public agencies act in relation to citizens in a rationally comprehensible and predictable way, we have reason to wish that they act in accordance with this conception of formal justice. And hence we have reason to require that justification of decisions, claims, defences and the rest proceed by way of settling or propounding a ruling which covers the instant case and defines a range of like cases. Let it be decided one way or the other, whether it be decided that

> If a will is formally valid, it ought in any case to be put into effect, regardless of other circumstances;

or be decided *per contra* that,

> If a beneficiary under a will has murdered the testator, the will ought not to be put into effect in favour of the murderer, regardless of its formal validity.

To bring the matter to this stage is not to have given a full or a complete justification of a decison. Universalization is necessary but not sufficient to justification. In the next section of the paper I shall have something to say about what else goes into justifications.

But for the moment I want to continue with my theme about case-by-case reasoning. I am certain that in the legal systems of the U.K., and in common law systems elsewhere, universalizability in the sense I have discussed above is a standard feature of legal argumentation. Courts do give rulings in just the way outlined as an essential step in justifying their decisions. Litigants (or their lawyers, more commonly) do seek to clarify legal issues at stake by the formulation of what Scots lawyers call 'pleas in law'[11] — generic propositions of law supporting the particular case in view. Stage 3 of the arguments put above is essential to justification.

Just this is what makes case law possible. Because courts do expressly or impliedly make rulings on issues of law posed by rival parties in litigation, it is possible to have a system or a practice of precedent. We can understand what the *ratio decidendi* of a precedent was to the extent that we can get clear what points the court thought it necessary to rule on, and what ruling it made.

But of course, just because there is a practice of following precedents, the courts have reason to be reasonably cautious as to the width and sharpness of the rulings they give. If this case involves *murder* of a testator, and if it is concluded that the murderer may not profit by his crime, most probably the court will be satisfied simply to hold that, at least in cases of murder, rights in a deceased person's estate should *vis-a-vis* the murderer pass not to the murderer as *per* the will, but to those entitled on intestacy. That leaves open the question whether in other cases of lesser forms of unlawful homicide the same holds good; and so too for other forms of unlawful act resulting in death.

What is more, later courts have reason to reject unduly wide formulations of principle as being binding on them. They are in a position to explain and to distinguish the reasoning of earlier decisions in carrying out their work of seeking an acceptable conclusion for new cases exhibiting new circumstances. Nor are they ever bound by the very words used by the earlier tribunal, however authoritative. And where in an appellate court a multiplicity of opinions concurring and dissenting has been issued, the possibilities of indefinition and open-endedness of rulings are multiplied.

It is in this way that I would build up an account of the pragmatic, experimental, step by step approach of case-law. Some of that account depends on obvious variables, such as whether or not judicial precedent is deemed a formal source of law, whether or not there is any rule of law forbidding *arrêts de règlement*, how discursive and explicit the published *'motifs'* of the decision are, whether multiple opinions are permitted, tolerated, expected or prohibited; and so on. These matters are variable and do vary from legal system to legal system, as we all well know.

What is less likely to be variable I think is adherence by lawyers to the conception of formal justice which I advanced as the ground of the element of universalization or universalizability in legal justification. The grounds for this are not special to particular legal traditions. The kind of rationality in government which it expresses is likely to be widely prevalent — nor can I disguise my opinion that it ought to prevail everywhere.

Hence, even when there is most variation in the variable matter sketched a few moments ago, I would expect to find that in all the legal systems here represented it is an implicit if not explicit canon of legal justification that decisions, claims, defences etc. be shown capable of being subsumed within some generic or universalized ruling on the law.

III

The point just made about the universalisability of rulings in law is not intended to exclude those very clear cases where simple deductive justification can take place. In ruling that the facts in the instant case are an obvious instance of the operative facts p covered by a binding legal provision *if p then q*, and in holding accordingly that the relevant legal consequence q ought to be implemented, a court is impliedly ruling that binding legal provisions ought to be applied whenever they are clearly applicable. On one view of it, that is a tautology; on another it is a political principle which is both highly important and normally acceptable though subject to exceptions. To enter into further discussion of this would be to embark upon the justification of deductive justification — the 'underpinning reasons', as I have elsewhere called them, for accepting an established and determinate legal system.

For the present purpose, it is sufficient to note that such further discussion would be relevant. But I do not enter upon it here. There is no time to deal with it.

More interesting for today is to pursue the question of justification when the case before us is not a clear one; when a doubt has been raised as to the proper applicability or interpretation of some admitted rule of statute law or of case law, or — to put it as generally as I can — when the question is as to the proper bearing of 'the law' upon some disputed or disputable question of right arising in a given set of factual circumstances. How can we justify our answers to these questions which could in effect be posed as '*quid juris*?' questions.[12]

That a universalised ruling be expressly given or a universalisable one impliedly given in response to the *quid juris* question is a necessary condition of satisfactorily justifying one's decision. But it is only a necessary, not a sufficient condition. What makes a difficult point of law be a difficult one is exactly this: that each side of the case can produce a possible or even plausible ruling in its own favour. The problem being one as to choosing between possible rulings in law, the issue is then how we can justify such choices.

The suggestion which I make and shall argue for is as follows: such choices are justified both by *consequentialist* arguments showing the acceptability or unacceptability of a ruling one way or the other having regard to their consequences and by arguments of *coherence* and *consistency* showing how a ruling acceptable on other grounds can fit with the existing relevant body of law, i.e. can fit with the legal system as already authoritatively established.

To illustrate and to support these points, I shall continue with the example of the murderous legatee — recalling again that such an example has figured prominently in Professor Dworkin's arguments[13] as to deficiencies of legal positivism which can be proven by showing the importance of arguments from principle in the law, the principle in *Riggs* v. *Palmer* being:[14]

> No one shall be permitted to profit by his own fraud or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own wrong.

For my part, I shall pursue the point by reviewing some English cases dealing with the same issues and other related issues. Certainly English judges have been as firm as the New York judges in favour of that principle. In the case of the notorious English murderer *Crippen,* who had hoped to provide for his mistress Ethel le Neve to succeed to assets derived from his murdered wife's estate, it was stated by the President of the P.D.A. Division of the High Court, Sir Samuel Evans, that:[15]

> It is clear that the law is that no person can obtain or enforce any rights resulting to him from his own crime; neither can his representative claiming under him obtain or enforce any such rights. . . . The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence.

That assertion was expressed to be supported with the authority of an earlier case,[16] raising the issue who if anyone was entitled to the proceeds of a life assurance policy taken out by the deceased in favour of the wife who had murdered him. There Fry L.J. remarked that:[17]

> It appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.

And why is it against 'reason' for such rights to be enforced — presumably because it is self-defeating ('self-contradictory' in a wide sense of the term) both to declare certain conduct criminal and subject to penalties while at the same time enforcing benefits derived from the course of conduct in question.

Certainly the original elaboration of the doctrine in question proceeded on just that footing. In the 1830 case of *Fauntleroy,*[18] the Lord Chancellor Lord Lyndhurst refused to permit the assignees of a bankrupt who had committed forgery (and been executed for it) to recover the proceeds of a life assurance he had taken out. Lord Lyndhurst said:[19]

> Is [such a life policy] not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? Namely, the interest we have in the welfare and prosperity of our connexions?

In summary: the various rulings to the effect that murderers may not enforce rights vesting in themselves as a result of their crimes, and that criminals cannot validly insure against paying the penalty for their crimes, have a general consequentialist justification — the law would otherwise be in effect self-contradictory, in both penalising and rewarding certain conduct; any alternative ruling would 'take away one of [the] restraints operating on the minds of men against the commission of offences'.

What is more, the overall effect of the relevant rulings can be stated in terms of some such general principle as that quoted above from Sir Samuel Evans[20]

> . . . [N]o person can obtain or enforce any rights resulting to him from his own crime.

But of itself, that principle goes a long way further than the specific rulings on the topics discussed. In the days when suicide and attempted suicide were crimes in English law, it was necessarily a question whether life assurance policies were valid in favour of the representatives of persons who had committed suicide while sane. Plainly, the principle mentioned above applies fair and square, and indeed the House of Lords held in 1938 that such policies were not enforceable in such circumstances — though it did so with some hesitation, recognising that life assurance policies were commonly used as securities for debts and accordingly that their utility as securities was to a degree undermined by the non-enforceability rule.[21]

Although the latter consequentialist argument in the suicide case was not held forceful enough to justify non-application of the principle in question, the opposite was the outcome in relation to motor insurance cases. Sometimes a person who causes another's death while driving negligently is guilty of manslaughter. Suppose someone while driving under the influence of drink kills one person and injures another, is prosecuted and convicted of manslaughter and is successfully sued for substantial damages by the injured person? If he has insured himself against liability to third parties, can he 'be allowed to claim indemnity' from the insurance company against the award of damages, or is that an impermissible case of 'obtaining or enforcing a right resulting to him from his own crime'?

The decision in such cases has been that the claim for indemnity under the insurance policy is not ruled out.[22] The argument that it is ruled out was, as Roche J. said, one which 'cuts at the very roots of a very large number of these motor car policies'.[23] What is more, other forms of indemnity insurance would be struck down at the same time, such as workmen's compensation insurance as applicable to cases of injury to workmen arising out of common law negligence or breaches of the Factory Acts. 'The results are very far reaching if the mere fact that the assured has offended against the criminal law, however inadvertently, precludes him from recovering under a policy of insurance'.[24] A further factor in the argument was that at the material time the proposal (since enacted into law) was in the air that third party liability insurance ought to be compulsory in case of all drivers 'on the ground that with the spread of motoring the risks to other persons on the road are so great, and the risk or chance of injury from any impecunious person is so great, that it is really unfair that people should be driving when they are not covered against third-party risks'.[25]

So in these cases the ruling is that a policy holder retains the right to be indemnified under a third party liability insurance policy, even though the events giving rise to liability include criminally negligent acts of the policy holder. And what justifies the ruling is an appreciation of the consequences of the alternative ruling, to wit that a large number of risks ostensibly covered under many types of policies would not in fact be covered, and that this would be 'unfair' to those injured by impecunious persons who lacked the resources to meet their liability without recourse to insurance.

In a fairly obvious way, this reasoning is symmetrical with the argument which originally justified the rules that murderers can't inherit from their victims and that criminals can't insure against punishment. To hold otherwise in these cases would be to countenance incentives to criminality, or at very least a substantial diminution in disincentives thereto; and these outcomes would be highly undesirable. And it would be undesirable on three counts — first, because it would involve the law in a kind of internal contradiction; secondly because it would or might evince a failure in properly thoroughgoing disapproval of crime; thirdly because, as a result, more crimes might be committed.

I am perhaps open to criticism for lumping all these considerations together under the heading of 'consequentialist' arguments.[26] Among the 'consequences' of a ruling I am including *both*:

(i) the logical implications of the ruling, viewed by reference to the range of hypothetical cases it covers and
(ii) the results or practical outcomes which will or may ensue given the existence of a rule having those logical implications.

It may be said that these should be sharply distinguished.

Moreover, as is clear even from the few examples I have chosen in this paper, such 'consequences' (implications and outcomes) fail to be evaluated by reference to more than one criterion — we have seen reference to such concepts as 'fairness' to victims of road accidents involving impecunious drivers; contradictoriness in the law as undesirable; desirability of expressing unambiguous disapproval of crime; undesirability of increasing frequency of crimes arising from failure to disallow certain incentives to criminality.

It could be represented that only the last mentioned ground of evaluation properly belongs to 'consequentialist' argumentation, which indeed is properly concerned only with outcomes of acts, and which is not concerned with questions of 'fairness' or 'justice' at all.

My first answer to this would be that I can see a case for distinguishing implications and outcomes, though in relation to the present subject matter it need not disturb as to lump both together as 'consequences' so long as we are aware of the internal distinction. My second answer would be that on any view, a concern for consequences presupposes a readiness to *evaluate* consequences, and that it should not be assumed without proof that there is only *one* criterion (e.g. Bentham's 'happiness principle') by reference to which such evaluation can rationally proceed. In fact, the internal structure of consequentialist argumentation is more complex and interesting than its detractors or its proponents commonly allow. (Clarifying that structure is interesting enough in itself to justify our giving attention to this aspect of legal argument; but that is not *my* reason for pursuing it here.)

Suffice it under present constraints of space that I have indicated a difficulty and the outlines of the solution I favour.

Now I must move on in the fourth section of my paper to considering what I have called the requirements of consistency and coherence as requirements of legal justification in the choice between rival possible rulings on a given matter.

IV

In confronting the problem appointed for this section, I shall go on with the running example which I have been using all along.

Even those who agree that the cases concerning third party liability insurance for negligent drivers were wisely decided on the consequentialist arguments may be troubled about the question whether *the law* allowed of such decisions however desirable from the point of view of public policy.

That certainly was a matter of concern to the judges involved in making the decisions. They had to satisfy themselves that there was an available line of rational distinction between these cases and the prior authorities covered by the principle that no one should be enabled to obtain or enforce a right resulting to him from his own crime.

As Roche J. said in the previously quoted case of *James*:[27]

> . . . [T]he Act which brought about criminal liability in *Tinline's* case and in this [present] case and [which] brought about the civil responsibility in both cases, was negligence . . . [I]t was negligence which was not the wilful or advertent doing of an act by which the plaintiff injured or killed the persons who were injured or killed.
>
> In those circumstances, in my view, there is not on the part of the person who does an unlawful act that degree of criminality which makes it against public policy that he should be indemnified against it. . . .

Thus it appeared that a reasonable line of distinction could be drawn between cases involving wilful and advertent criminal acts (here the rule is against enforcement of resultant rights) and cases involving unlawful acts which are merely negligent, however grossly and culpably negligent. Furthermore, as against the principle that one cannot derive a right from a criminal act, there is the 'general principle' that 'the courts should be reluctant to interfere with contracts unless it is plain that their enforcement is contrary to public policy'.[28]

Simple though the illustration is, it is as clear an example as I could wish for. As to the first argument cited, the argument from the distinction between wilful and inadvertent acts, this exhibits the requirement of *consistency* in operation. One may not, as a judge, decide a case upon any ruling which contradicts or 'controverts' (as it is perhaps better to say) an existing established rule of the system. But if the pre-established rule is distinguishable, e.g. as relating specifically to unlawful acts wilfully and advertently committed, that requirement is satisfied.

If, additionally, the ruling proposed is subsumable within some general principle of the legal system, such as the principle of the sanctity of contracts freely made ('the courts should be reluctant to interfere with contracts'), what I call the requirement of 'coherence' is satisfied.

The point here is that general principles are to be understood as expressing values which are held to be significant in and for the legal system or some branch of it. They are broad normative generalisations under which more concrete rules and rulings of the system can be subsumed, and through which — through the observance of which — some value such as the sanctity of contracts or the sanctity of human life or the discouragement of crime or whatever is furthered. Hence 'coherence' is secured by observance of general principles in legal argumentation, to the extent that sets of rules are made to make sense by being geared together to the pursuance of some supposed value or values. (I prefer this account to Ronald Dworkin's[29] which ties the concept of 'principle' to that of 'rights' or 'individuated political aims'. It is an irony that *Riggs* v. *Palmer*,[30] his leading example of a legal principle, has as its primary English formulation a proposition concerning not the existence but the non-existence of rights in certain cases. All the more so since it explicitly depends on considerations of 'public policy', a concept which Dworkin considers alien to that of 'principle'.)

Argument by analogy is also concerned with this element of 'coherence'. This is aptly illustrated by a decision of the English Court of Appeal in a case which concerned rights of succession under a will, one of the legatees having been found guilty, not of the murder, but of the manslaughter of the testator.[31] In this instance, it was held that it would be unreasonable to distinguish the one crime from the other, and the putative legatee was excluded from her legacy:[32]

> In the present case it seems to me that the estate of the testator must go in the same way as if there was no benefit given to the defendant at all, and that she cannot in any way benefit from the crime which she has committed. I see no reason for restricting the rule to cases of murder.

Oddly enough, this decision does not seem to have been very carefully considered in the cases on the motor insurance policies which on my earlier line of thought might appear indistinguishable — unless the difference between enforcing contracts of insurance essentially to benefit third parties and enforcing testamentary benefits in favour of the felonious beneficiary can be pressed into service. The fact is that the key issue is the consequentialist one — the judges having set their faces against a decision which would have had 'far reaching results' — and 'unfair' ones — in relation to motor insurance, they can sufficiently distinguish analogous cases to secure the point against plain inconsistency; and even though there be some lack of fit between the different lines of authority concerning manslaughter, there is after all substantial coherence as between the various rulings on insurance and the various rulings on matters of testamentary succession to one's victim's estate or part of it.

Perhaps it would be here, in relation to this tolerated divergence of authorities that the 'Cartesian' mind would recoil with most horror from the perhaps unduly pragmatic approach of the English judges working their way through the cases. Certainly there must in such matters be different traditions and styles affected by all manner of local factors.

But my question remains whether beyond the differences of style there are not also similarities of substance. The reasons why judicial rulings ought to be universalizable are not peculiar to the U.K. if they are good reasons at all. A concern for the consequences of such rulings is not based on anything peculiar to the U.K., but solely on the obvious ground that legal questions are practical questions whose answers do have effects in society. A concern for consistency and coherence can likewise be based on the needs of a legal system viewed as a certain sort of normative system geared towards the realisation of *some* constellation of social values.

That such concerns are fundamental to the real life of any developed order is at least strongly corroborated by the Indian experience, so far as I may presume to speak about that. The 'constellation of values' to which the legal order of the sub-continent is geared is that specifically Indian conception of socialism enshrined in the Constitution. Upon these values the judiciary have most manifestly drawn in their working out of the 'consequentialist' elements of argumentation proper to hard cases in law; thereby they have honoured the requirement of coherence of their legal system, while at the same time observing that fidelity to the settled law of the land which is expressed in the requirement of consistency. To those who have so steadfastly upheld in this way the Rule of Law in the World's most populous democracy much honour is due, and not least to the gentleman to whom this book is dedicated.

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2. See *Prohibitions del Roy,* (1607) 12 Co. Rep. 63.
3. See, *e.g.*, G. Gottlieb, *The Logic of Choice* (1968), 33-9; W. Twining and D. Miers, *How to do Things with Rules* (1976); 51-5; MacCormick, *supra* note 1 at 45.
4. This example is based on The Succession (Scotland) Act, 1964 — which I have discussed more adequately in my 'Rights in Legislation', in P. M. S. Hacker and J. Raz, eds., *Law, Morality and Society* (1977).
5. Compare sources cited in MacCormick, *supra* note 1 at 39-41.
6. It is something of an over-simplification to treat such arguments as a straightforward application of *modus parens*. A more rigorous (and correct) statement of the logical form of such arguments may be found in R. Alexy, *Theorie der juristischen Argumentation* (1978) 274-9. See also Patricia White, book review (1980) 78 *Michigan Law Review,* 737-42.

7. See M. Rheinstein (ed.), *Max Weber on Law in Economy and Society* (1954).
8. See R. Dworkin, *Taking Rights Seriously* (Revised ed., 1978), Ch. 2.
9. 115 N.Y. 506, (1889) 22 N.E. 188.
10. R. M. Hare, *The Language of Morals* (1952); *Freedom and Reason* (1963); 'Principles', 1972-3 *Proceedings of the Aristotelian Society*, 1. See also Alexy, *supra* note 6 at 82-107.
11. See D. M. Walker, 'The Theory of Relevancy', (1951) 63 *Juridical Review*, 1.
12. As I suggested in *Legal Reasoning and Legal Theory* (1978), Ch. 4, such questions might be dubbed questions of 'interpretation', of 'classification' and of 'relevancy'.
13. Dworkin, *supra* note 8.
14. *Supra* note 9 at 511; 190.
15. *Re Crippen*, [1911-13] All E.R. R. Rep. 207 at 209.
16. *Cleaver* v. *Mutual Reserve Life Fund Association*, [1892] 1 Q.B. 147.
17. [1892] 1 Q.B. 147 at 156.
18. *Amicable Society* v. *Bolland*, (1830) 4 Bli. N.S. 194.
19. *Id.* at 211.
20. *Supra* note 15.
21. *Beresford* v. *Royal Exchange Assurance*, [1938] A.C. 586.
22. See *Tinline* v. *White Cross Insurance Association Ltd.*, [1921] 3 K.B. 327; *James* v. *British General Assurance Co. Ltd.*, [1927], 2 K.B. 311; [1927] All E.R. Rep. 442.
23. In *James's* case, see [1927] All E.R. Rep. at 444.
24. *Ibid.*
25. *Id.* at 446.
26. Compare B. Rudden, 'Consequences', (1979) *Juridical Review*, 193-201, and R. Ferguson, book review in (1979) 6 *British Journal of Law and Society* 272-5; see also J. M. Finnis, *Natural Law and Natural Rights* (1980) 111-118, 131-2.
27. *Supra* note 23 at 445.
28. *Id.* at 444.
29. *Supra* note 8 at 90f.
30. *Supra* note 9.
31. *Re Hall, Hall* v. *Knight and Baxter*, [1914], P. 1, [1911-13] All E.R. Rep. 381.
32. [1911-13] All E.R. Rep. at 384, per Swinfen Eady, L.J.

6

HUMAN RIGHTS IN A PLURAL SOCIETY: A CHALLENGING CONSTITUTIONAL PROBLEM

LESLIE G. SCARMAN

It is a great honour to be asked to contribute an article to a collection dedicated to Mr. Justice Krishna Iyer. I have chosen my Weir Memorial Lecture delivered in Toronto in September 1979 for two reasons. First, it will not be widely known (if at all) in India or the United Kingdom. Secondly, it expresses, albeit in a historical western context, views which I believe to be of relevance not only in Canada, where it was delivered, but in all countries which cherish freedom. India may count herself blessed that the founding fathers of the modern state drafted a Constitution which I have always considered as great an instrument of constitutional development as that of the U.S.A. There is, however, a significant difference. The Indian Constitution has the advantage of having been written in the 20th century. It meets head-on the problem of economic and social rights: it is not confined, as the 18th century U.S. Constitution was, to the safeguarding of political and civil rights. Since my Weir lecture is concerned with economic and social, as well as political and civil rights, I believe it to be relevant to the Indian and British problem.

"Human Rights in a Plural Society" — my title derives from a currently world-wide aspiration. But the problem is old. Today we tend to think in terms of ethnic origin or skin colour when we talk of a plural society. But there are other social divisions just as difficult to bridge; for example, sex, social class, economic circumstances, the landed and the landless, the free and the unfree. Even that most unitary of Societies—the Greek city state—was a plural society, incorporating the rightless slave as well as the fully entitled citizen. And the Roman world was as complex a plural society as any in the history of mankind. But human rights? Are they as prevalent or as old-established as the plural society? That is another story. For most of mankind human rights have been, and continue today to be, more conspicuous in the mouths of men than in their practice. *Vae victis*! woe to the conquered and the oppressed—these cries are nearer the substance of the matter, the true facts of life, than the lip-service paid by the Universal Declaration of Human Rights.

I am not here, however, to intone a lament for the double standards of mankind. On the contrary, I rejoice that at least we pay tribute with voice, heart and mind to the entitlement of all men to political rights, civil liberties, and a fair share of social and economic opportunity and advantage. Prejudice, poverty, fear, ambition and greed: these are the root causes of oppression, deprivation and unfair discrimination which must be overcome. My intention in this address is to discuss some of the ways and means whereby the law can help to strengthen modern man's ability to transmute that which he knows to be right and just into the routine operations of his life in society. If what for centuries have been treated as issues for political controversy can by some alchemy be converted into routine administrative decisions subject to judicial review in the event of dispute or grievance, we shall have taken the sting out of the problem. We shall then have justiciable issues capable of a decision by adjudication reached on the basis of accepted principles of social behaviour. Then, and only then, will we be able to say with confidence that our society effectually in its daily practice protects the substance of human rights. Our voices and our actions will then coincide.

The alchemy required is to be found only in a very complex formula. We have to review the whole public process of our society—its politics, its administration, its law-making, and its law enforcement. An appraisal of the executive, legislative and judicial functions of government is needed. The limitations of each have to be accepted, the potential of each exploited. The alchemy will be achieved only if for competition between them we substitute partnership. To talk of checks and balances, even though they are needed, is a sterile approach: a positive effort from each of the three arms of government in an acceptable new constitutional combination is needed.

Contrary to what may now be said of Britain's constitutional weaknesses in the protection of human rights, Blackstone stated the objective of a constitution with great elegance, though in his complacent way he assumed that in the England of the 18th century it had already been achieved, when he said:

> If the supreme power were lodged in any one of the three branches [of Government, i.e., King, Lords and Commons] separately, we must be exposed to the inconvenience of either absolute mon-

> archy, aristocracy or democracy: and so want two of the three principal ingredients of good polity; either virtue, wisdom or power.[1]

Blackstone does not in this passage mention the Judges. Constitutionally he was correct. The judicial function in Britain is an emanation of royal power, and was by the Act of Settlement and Bill of Rights of 1688/9 effectually subjected to the legislative sovereignty of Parliament. Further, be it observed, Parliament itself is our supreme court—the House of Lords exercising the jurisdiction which historically belongs to Parliament as a whole. Thus in Blackstone's analysis of the constitution the Judges are rightly included in King and Lords—the two bodies to which I am comforted to note he ascribes virtue and wisdom. Power, he recognised (and this is starkly true today), is lodged in the democracy, represented, even in his day (albeit incompletely), by the House of Commons: and he saw the peril of allowing absolute power even to the democratic element of the constitution: Blackstone felt, as Englishmen still feel, that absolute democratic power is, in truth, as dangerous as the unlimited power of an absolute monarch or a ruling obligarchy. And for the same reason: there is no guarantee that the rights of those—more often a minority, but sometimes a majority—who do not wield the power will be respected or enforced. An American Colonist, some 50 years before Blackstone, summed it up. In 1710 John Wise of Massachusetts said:—"Englishmen hate an arbitrary power . . . as they hate the Devil."[2]

It is significant that Blackstone did not describe the British constitution by reference to the tripartite division of function which has been part and parcel of Western political philosophy since the time of Montesquieu, the division of government into the three functions, legislative, executive and judicial, and the need to keep each separate and limited in power to its own proper sphere. Though in Britain the analysis has been accepted, we have never in our constitutional practice kept the three functions rigorously separate. The system of checks and balances inherent in the separation of the three functions, itself a great curb on abuse of power, is therefore not to be found in the United Kingdom constitution. At the very highest level all three functions are exercised by the Sovereign in Parliament. Certain consequences follow. One is that British judges have become isolated from the political life of our community. Certainly they are independent—but only within the circumscribed field in which our Parliamentary constitution permits them to operate. As a great 19th century judge, Willes J. put it, "we [the judges] sit here as servants of the Queen and the legislature".[3] There is in the United Kingdom no public law: but only conventions accepted by Parliament.

Yet the force of events is compelling the judges to develop an administrative law. It may be that the decision taken in 1680 to refuse our judges a constitutional role is now proving a true weakness in the capability of English law and the English legal system to protect human rights. If so, it is a weakness born of historical accident: the legacy of a constitutional settlement which ante-dates the modern menace of unbridled majority power.

Put therefore in constitutional terms, my theme is that absolute power, if exercised by any one institution in society, sets human rights at risk. Put in terms of jurisprudence, my theme is that man by his recognition of the existence of human rights accepts the presence of a moral content in the law. The school of thought that law is what the Sovereign commands is found wanting because it assumes the possibility of law which neither upholds nor even recognises human rights. I agree with McRuer's aphorism that "The Rule of Law is hard to define but this much is clear there may be rule by law which is not rule by the Rule of Law".[4] Put in political terms, my theme is that resistance, even ultimately revolution, is legitimate against a regime which suppresses human rights. As an Englishman, I recognise and applaud the legitimacy of the United States of America. These fundamental articles of belief have to be asserted and maintained if human rights for minorities in a democratic society are to be won and protected. A constitutional safety-valve has to be designed to relieve men of the pressures of excess of power.

The Western world of our time is making an honourable endeavour to cope with the problem. There is no single blue-print for success. But I believe that modern experience shows that there is one essential feature of every solution: a constitutional mechanism strong enough to prevent absolute power from lodging in any one group of society or in any one institution coupled with a plain declaration of the rights and duties of man in society. These rights and duties are those which are so fundamental that civilised man cannot survive without them; they are the *jus naturale* of mankind—the *jus gentium* of all races.

It is, I hope, helpful to take a look at the various solutions to the constitutional problem attempted in the Western world. The countries, whose legal systems derive from the Roman, build the necessary restraints into the very exercise of executive or administrative power. This was the Roman way of governing their world—a plural society of immense complexity based on a rigid class structure ranging from the privileged Roman citizen to the slave labour force which had no civic rights at all.

The system, as democratised by Napoleon, has become one of great sophistication. It exhibits a combination of constitutional and democratic control of the legislature and the executive, which effectually prevents abuse of power by either. The ordinary courts are not used to exercise any part of this control. In France, for instance, Conseil d'Etat, an administrative body enjoying complete independence, exercises in a judicial spirit functions of supervision within the administration and over certain legislative areas. In Germany, however, the constitutional control is exercised by a constitutional court. Notwithstanding their variations, the civil law systems of Europe exhibit the two essential features: a constitution which distributes power, an independent adjudicating authority to restrain the abuse of power, and within the constitution a declaration of the human rights which are the birthright of all who are subject to the constitution. Thus human rights become constitutional rights and enjoy the protection of the mechanism whose function it is to uphold the constitution. A remarkable feature, which in this one respect has its parallel in British constitutional practice, is the isolation of the ordinary courts. They have no supervisory role in constitutional matters.

Parliamentary democracy, as developed in Britain, goes about the task very differently. It has the backing not of a written constitution but of the common law. Though now is not the occasion to research the early history of our law and institutions, I have no doubt that Parliament, an institution (as its French name reminds us) of Norman origin, provided in the plural society of those times the oppressed English with their chance to voice their grievances and to insist on a common law whose principles derived not from royal decree but from the customs of the people. The Normans—most intelligent of conquerors—were astute to use both to keep themselves in power. The King put his authority behind the enforcement of the common law. He was ready also to call Parliament to redress grievances. Though no one sought to conceptualise the common law, the royal judges developed it upon the unspoken, implied, premise that the law existed to protect the rights of the individual, and that the individual was free to act, or not to act, according to his wishes so long as his acts or omissions did not run counter to expressed or recognised law. The recipe could not have been better: but it was at the mercy of the cook, as the Stuart Kings with their control of the judges exposed. It needed a civil war followed by a "reprise" of Stuart rule to persuade the triumphant Parliamentarians that their chosen institution and its ally, the common law, needed constitutional protection. They achieved it in 1688-9. The long-term implications of that famous settlement are only now making themselves felt. Its essence was the sovereignty of Parliament: the price paid was the subjection of the law to the will of Parliament. The restraint on Parliament's power was internal—a two-chamber system in which both Houses possessed a legislative veto. Two developments have weakened, if not destroyed, this restraint:—universal adult suffrage and the reduction of the power of the House of Lords.

Universal adult suffrage is a necessary political right. But, if it results in a majority having, through its legislative control of the law, the power to shape the law as it wishes, it offends one of the cardinal principles protecting human rights: the avoidance in society of absolute power vested in any one institution. The mischief is not universal suffrage itself: but the power allowed by the constitution to those who are elected. The party which wins the election sees itself, very reasonably, as speaking and standing up for the interests of the majority. And it is this party which provides the government. Thus a party, which, sometimes even by a minority of the popular vote, wins the election controls the legislature and the executive power of the State: and the judges are constitutionally bound by the legislative sovereignty of the assembly which the party controls. And only that since 1911 the House of Lords has had no power to veto: and one can see that Britain, in effect, has become, in Blackstone's phrase, an absolute democracy: and the dangers of that situation are as he described. Fortunately, thanks to the temper and political skills of the British people, the dangers, though clearly exposed by the events of the last 35 years, have not proved mortal, and I am confident that they never will: but the duty of the constitutional lawyer is to warn of perils ahead, and to encourage reform before the sea gets too rough.

Very understandably, most British lawyers believe that the combination of Parliament and the common law makes a written declaration of human rights and constitutional machinery for their enforcement unnecessary. Some go further: they suggest that any such constitutional reform could not co-exist with the common law, but would destroy it. The British public is, however, not so complacent. In particular, public opinion is beginning to be disturbed by rulings of the European Court of Human Rights.

In 1950 the member states of the Council of Europe signed the European Convention of Human Rights and Fundamental Freedoms. The United Kingdom ratified it in 1953. The effect of ratification is less than it might appear. The United Kingdom became internationally bound, as a sovereign state, to apply the Convention: but the Convention did not become part of the internal law of the United Kingdom. Parliament can enact the Convention so as to make it part of our law, but has not done so. The possibility therefore of a gap developing between the requirements of English law and the obligations of the United Kingdom under the Convention is a real one. The embarrassment is all the more acute because aggrieved individuals can get their grievances heard and adjudicated upon by the European Court of Human Rights.

Nevertheless the lawyers' case against constitutional reform has to be taken seriously. English law is a success story: and it remains capable of adaptation, as I shall demonstrate when I outline to you how we are tackling at this moment the problem of minorities in our society. I take first the more fundamental objection—that a written constitution is not possible. The experience of the common law world outside Britain has demonstrated that the common law not only survives but thrives against a background of constitutional rights safeguarded by a written constitution. The United States is the best illustration. To a lesser degree Canada and Australia also make the point. In the United States of America there is to be found the fully developed position—a constitution embodying a declaration of fundamental rights and imposing a duty to protect and enforce them upon the judiciary at the pinnacle of which is a supreme court, the existence of which is itself protected by the constitution. Canada and Australia also have written constitutions and a supreme court and Canada, of course, has its own federal Bill of Rights. But the formulation of human rights as constitutional rights safeguarded against infringement even by the legislature is in neither country yet fully developed.

The United States constitutional jurisprudence is of immense importance. It treats the issues which arise between the citizen and the state as justiciable, *i.e.*, legal not political questions. This is so even where, as in the de-segregation of the schools or the "positive discrimination" alleged by Mr. Bakke to have operated against his admission to medical school, the area in which the issue arises is politically highly charged. And it is possible to challenge in the courts the validity of legislation on the ground of its un-constitutionality.

Significantly, none of these developments, so valuable for the protection of human rights, has weakened the common law tradition. Many of us in Britain believe that the way the common law is handled in the United States of America, Canada, and Australia is an object lesson. Certainly the House of Lords and the Court of Appeal attach great importance to American and Commonwealth decisions in civil and criminal cases which raise fundamental issues touching the rights of the citizen. The Privy Council, of course, has a long tradition and a wealth of experience in looking to Commonwealth law. Let me just mention one or two of the issues on which the courts and legislature of Britain have recently had resort, greatly to our benefit, to American and Commonwealth decisions: economic duress, executive immunity (Crown privilege) from discovery of documents, *mens rea* in murder cases; to which short list many more may be added. Perhaps the illustration nearest to my subject is that in matters of legislation the United Kingdom has found valuable models in North American civil rights legislation: the United States Civil Rights Act, 1964 and Human Rights statutes of Canadian provinces.

All this is very well, it may be said, but is a written constitution necessary to supplement the common law's protection of human rights? A fully reasoned answer would be out of place in an address which cannot include a detailed appraisal of British administrative law and British principles of statutory interpretation. But I must make a few comments. First, the judges have done wonders in developing since 1950 judicial review of administrative decisions by central and local government: and they have been helped by Parliament; for, following upon the report of the Franks Committee[5] into the work of administrative tribunals and inquiries, it legislated for appeal from administrative tribunals on questions of law.[6] More recently, Parliament has established, outside the court system, the so-called Ombudsmen to report upon maladministration. Nevertheless, the judges lack any comprehensive law defining the scope of judicial review and are powerless in the face of legislation which itself infringes human rights.

Secondly, under the leadership of Lord Denning, Lord Wilberforce and Lord Diplock a "purposive" approach to the interpretation of statutes has been developed: the literal approach has given way to one in which the judge is required to construe statutory provisions in the light of the purpose of the statute read as a whole. I expect Lord Denning to win his famous battle with Viscount Simonds in which he asserted that it was the duty of the judge to fill gaps in legislation, where the intention of Parliament was clear—an assertion which Lord Simonds angrily described as a naked usurpation of the legislative function.[7] But the extent to which the courts may look outside the words of a statute to find its purpose remain obscure and unsettled.

Though the courts may now fill a gap in a statute, they are less able to introduce new principles into the common law, notwithstanding the 1966 Practice Statement of the Lord Chancellor that the House of Lords would no longer consider itself bound always to follow its own previous decisions. Two recent decisions of the European Court of Human Rights merit a mention in this context. The lack of human rights for convicted prisoners in Britain was exposed by the European Court in *Golder's* case, where a prison rule, which had the effect of preventing a prisoner from obtaining legal advice without the Home Secretary's consent (which in *Golder's* case was withheld), was declared an infringement of the European Convention. No common law principle exists which could have helped Mr. Golder: for he was a convict, and so rightless so far as civil liberties were concerned. Nor is it conceivable that the courts could have invented a principle—unless they invoked the Convention which, as I mentioned, is not part of English law. The second case is that of the *Sunday Times* newspaper held to be guilty of contempt of court by the House of Lords. The European Court declared that the relevant English law as accepted by the House of Lords was an infringement of the freedom of the press, which is one of the fundamental freedoms protected by the Convention. You will remember that this was the case in which the newspaper was prevented from publishing an article on the manufacture of the thalidomide drug at a time when litigation against the manufacturers was still pending. The Court of Appeal had striven to achieve a balance of the public interests involved—the one of justice and the other of the freedom of the press: but the House of Lords ruled in favour of no press comments on the facts of a case while still *sub judice*. The European Court, in effect, preferred the view of the Court of Appeal though they were careful not to challenge the correctness of the Lord's ruling in English law. They merely said that the state of English law, as revealed by the Lords, was inconsistent with the Convention—a disturbing conclusion for a country which has ratified the Convention.

It does not, of course, follow that, because the European Court has in recent years exposed some weaknesses in the protection afforded by English law to human rights, a reform of the constitution or of the legal system is needed. But it does follow that some reform is required. There are at least two schools of thought. One favours constitutional reform: our present Lord Chancellor has spoken strongly in support of this school. The other is that we can achieve all that is needed by detailed legislation and a strengthening of the principle and practice of judicial review without any basic alterations in our Parliamentary constitution. The debate is only just begun: and only the foolhardy would forecast the victor. But concern is not confined to lawyers; and the decision is certainly not theirs to take. When it comes, it will be the people's decision.

I turn now to review—very shortly—current developments in the United Kingdom. Many people are deeply concerned at the continuing exposure by the European Court of Human Rights of the inadequacies of English law in the protection it affords to human rights. A bill to incorporate the European Convention into English law has been introduced into the House of Lords by a Liberal peer, Lord Wade. It led to the House setting up a select committee to consider the advisability of a British Bill of Rights. The committee reported, by a majority of one (6-5), in favour: and on the 29th November 1978 the House voted by a substantial majority in favour. No doubt, the bill will be re-introduced in the very near future. If the United Kingdom were to bow to the logic of events by enacting the European Convention as its Bill of Rights, it would be taking, in 20th century conditions, an appropriate and decisive step towards the ideal of "mixed government" which Blackstone praised as a feature of our 18th century polity. For it would mean that the protection of human rights was entrusted to an independent adjudicating authority—in the British instance, the ordinary courts of the land. But it would be only one step forward. Without a written constitution, a Bill of Rights would remain, in theory, at the mercy of a repeal enacted by a bare majority of the House of Commons. But the substance of protection would have been achieved: even a majority has to spare a thought for the state of public opinion, and the repeal of a Bill of Rights would be little calculated to inspire confidence in ordinary men and women save, possibly, in a situation where the survival of the nation was seen to be at risk. In a free society it is far easier to prevent the first enactment of a Bill of Rights than to repeal it once enacted.

The protection of human rights cannot, however, wait for the United Kingdom to make up its mind on basic issues. Parliament has already intervened with anti-discrimination legislation. Discrimination is the ugly word of our times. In the context of human rights it has particular reference to inferior opportunities in housing, education, employment and social life. Equality in the field of political rights and civil liberties has been achieved, by and large, in the Western world. The United Kingdom has basically followed the Canadian lead by tackling the problem of the economic, educational and social deprivations suffered by minorities by a combination of administrative and legal process. The two statutes now in force are the Sex Discrimination Act, 1975 and the Race Relations Act, 1976. They are the same model operating in their respective fields. The Commission for Racial Equality has the duty of taking positive action to root out racial discrimination. In today's jargon it is a "quango", *i.e.*, a quasi-autonomous non-governmental organisation. Its members are appointed by the Government, it is financed from public funds, and reports to Parliament. But it exercises its own judgment in furthering the policy of Parliament. Conciliation, education, research, investigation, public relations, legal aid and advice to the victims of racial discrimination are its weapons. It has inquisitorial powers, which would appear to shock Lord Denning as well as some others,[8] and can initiate its own, as well as assist other people's litigation. The criminal law is not used to enforce compliance with the statute: but the civil law is. The statute creates the civil wrong of unlawful discrimination, the victims of which can claim compensation in the courts. The courts in which discrimination cases are brought are the county courts in housing and education cases, and the industrial tribunals in employment cases. Sex discrimination is being fought in the same way, the "quango" being the Equal Opportunities Commission.

These two statutory bodies represent an exciting and hopeful development in English legal and administrative practice. They are established to tackle the discriminatory denial of human rights to some members of the community by a combination of administrative and legal process. The statutory body has the administrative initiative, while the courts possess the power of judicial review. The courts exercise their functions in two ways. They can entertain applications by aggrieved citizens to review the lawfulness of what the statutory body has done or intends to do: and they are available to grant relief by way of compensation, reinstatement, declaration or injunction to victims of unlawful discrimination. Ultimate policy control of the two bodies rests with Parliament assisted by the element of judicial review involved in the interpretation by the courts of the two statutes as and when some action of either body is challenged as unlawful.

A direct result of the two statutes is that the business of protecting the human rights of women and racial minorities has become a routine operation undertaken by an independent administrative agency subject only to the supervision of the courts and to the duty of report to Parliament.

It is not surprising that some observers have concluded that nothing is needed in the United Kingdom to protect human rights other than detailed statutes such as these in the areas at risk. If the right to vote and the right to civil liberty are protected, as they are, by statute: if discrimination on the ground of sex or race is a civil wrong: if the benefits of the Welfare State are available equally to all—what more is needed than the background of the common law, its basic tenet being that you are at liberty to do anything which is not by law forbidden?

The argument takes heart from these successes and goes over to the attack. Is not a written constitution an unnecessary refinement, even an impediment to the smooth working of such statutes? The law exists, as Holmes J. was wont to say, in what judges do, not what they say they will or can do—unless, indeed, they do it. The life of the law is its detailed application in the cases which the judges decide. If the statute law is clear and specific, why burden society, or the judges, with a set of constitutional principles? Either they will be too broadly formulated to be of any use—or they will be sufficiently specific to give rise to inconsistencies with the detailed statutes.

United States law provides illustrations of conflict between the written constitution and State or congressional legislation. An illustration of the conflict in the field of human rights is to be found in *Bakke* v. *University of California*. Two codes of law had to be considered by the Supreme Court in that case—the constitutional Bill of Rights and the congressional Civil Rights legislation. Some of the judges (the group included the Chief Justice) managed to hold that the case raised no constitutional question but only a question of the interpretation of the Civil Rights Act, 1964: others (the majority) held that it raised both questions: and there was a further division of opinion running right across the first as to whether Mr. Bakke had suffered any wrong at all. Powell J. held that he had suffered a constitutional as well as a statutory wrong; the Chief Justice and his group held that he had suffered a statutory, not a constitutional wrong. Put together, these two groups outvoted those who, though agreeing with Powell J. that the constitution as well as the Civil Rights Act was in question, held there had been no breach of either. I can hear the English common lawyer exlaim: "What a ridiculous cross-word puzzle—and it can only happen with a written constitution". All that is required, he would say, is effective, detailed, civil rights legislation.

This is a truly formidable case: but like Nebuchadnezzar, it has feet of clay. The Bill of Rights is the basic safeguard, protected as an entrenched provision of the constitution. The civil rights legislation is a beautiful structure, no doubt: but repeal by Congress can tumble it down at any time.

This structural weakness of detailed legislation unsupported by safeguards against repeal has, I know, troubled the Ontario Human Rights Commission. In their 1977 Report, entitled "Life Together", they recommended, in their proposed revision of the Ontario Human Rights Code, that: "unless expressly stated otherwise, no Ontario statute or regulation shall be construed or applied so as to derogate from principles of this Act". Such a provision is very much *faute de mieux*. It is, I suspect, the best that can be achieved in the confederation context set by the British North America Act; and certainly in the United Kingdom we could do no better. Unhappily, neither in Canada nor in the United Kingdom is there to be found the ultimate constitutional support for human rights, implicit in article VI, 2 of the American constitution:

> This constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby.

Thus, the American constitution not only lends its strength to the detailed legislation: it is also an ever-present last resort if the legislation proves to be defective in any way. The problem of the gap or *lacuna* is taken care of: the judges have the constitutional duty to fill it by reference to the provisions of the constitution.

For these reasons I am led to the view that a written constitution offers the best chance for formulating, applying, and enforcing basic human rights. Being a common lawyer, I prefer to leave their application and enforcement to the ordinary courts of the land; but I recognise the value of the civil law model, of which the French and German systems are the modern examples. But the constitution is not merely a legal mechanism. It must also formulate and declare what are the human rights which it protects. In truth, this declaration is the important part of a constitution. But it is also the most difficult. For to the question—what is a human right?—there is no purely legal answer. The question, and its answer, requires a political and moral as well as a legal judgment. The question arises from, and has to be answered by, the social conscience of the people. I know of only one process of bringing to bear the conscience of a society. It is the political process. Ultimately, therefore, the formulation of those human rights which are to be accorded constitutional protection and the devising of a constitutional mechanism to protect them are the business of a democratically elected legislature. Similarly, revision of the constitution is for the same body. The legislature in changing the law must act constitutionally: but it must have the power, subject to constitutional safeguards, to alter even the constitution.

The political power—always, I repeat, to be exercised constitutionally and, to that extent, subject to judicial review—has therefore to provide the answer to the difficult questions which arise when we seek to ensure to all economic, social, and educational opportunities by treating these opportunities as human rights. The opportunities, because they depend upon the financial and economic resources of the community, are limited. If they are treated as today they are, as the subject of human rights, how are fair shares of a scarce commodity to be determined?

This was the basic question in the *Bakke* case. The dilemma in which the United States Supreme Court found itself was that either Bakke must be denied equality of opportunity to enable members of an ethnic minority a fair chance of a medical education, or the minority must lose that chance so that Bakke got the nomination which was his upon a balance of personal merit. Beneath the argumentation of the case lay some fundamental questions. What does the American constitution protect? The rights of individuals, or the rights of groups? Who wins, and who loses? The disadvantaged individual, or the diadvantaged group? These questions do not arise in the context of civil and political rights and liberties; for those belong to each individual citizen. But the Roosevelt freedoms from want and deprivation which are the basic premise of the economic, social and educational rights now recognised by the civilised world, raise the difficult problem of group deprivation. In the *Bakke* case the majority, who found for Bakke, adhered to the view that the constitution protects the rights of individuals; and, historically, they were surely right. But the future, it may be thought, belongs to the minority view. The conscience of society now requires the State to assist disadvantaged minority—or other—groups. The inescapable price, because resources are limited, is a loss suffered by members of those groups who are not disadvantaged. The avoidance of discrimination against certain groups requires discrimination against others. Discrimination, which is unlawful against one group, has, therefore, to be lawful when used against the other. The minority justices in the *Bakke* case would have developed the constitution by allowing such positive discrimination in favour of the disadvantaged. I expect that their view will ultimately prevail, and that so-called "affirmative action" programmes will be developed in the sector of economic, social, and educational rights and will be held to be constitutional. Recent United States decisions certainly point in this direction, *e.g.* *Kaiser* v. *Weber*,[9] where an employers' recruiting programme in favour of disadvantaged minority groups in the local work force was held valid.

Canadian and British developments designed to resolve the conflict of individual rights against group rights do, I believe, show promise. The Ontario Human Rights Commission has recommended that the law should allow a complaint of discrimination to be filed not only by an individual but by a "class of persons", and in its proposed new code would define unlawful discrimination as a wrong not only to an individual but to a "class of person". The Canadian federal statute[10] specifically excludes from unlawful discrimination special programmes designed to reduce group disadvantage by improving the group's opportunities in relation to the goods, services, facilities, housing, and employment which are the substance of human rights in the social and economic sector. And in the United Kingdom sections 35 to 38 of the Race Relations Act, 1976 are to a similar effect—though not so broadly formulated as the Canadian statute.

The importance of the *Bakke* case is neither the decision nor the reasoning, but the problem. The case exposes the challenge that a plural society makes to accepted western legal principle and political philosophy. The challenge is ultimately a political one. The courts can hold the line, as I think the United States Supreme Court has succeeded in doing, while society makes up its mind. The case is also a salutary reminder that constitutions can become outdated, unless they contain provision for change and adaptation.

For a question-mark hangs over the United States law. If the Canadian or British provisions for "affirmative action" programmes were to be added by way of amendment to the Civil Rights Act, would they be struck down as unconstitutional *i.e.*, as an infringement of the rights of "equal protection of the laws" and of "due process"?

I think not. I would trust the judges of the Supreme Court so to interpret the 5th and 14th amendments of the constitution that, within limits which they could be trusted to set, affirmative action programmes, as in *Kaiser* v. *Weber*, would be held to be constitutional. It would be consistent with their record. For I suppose the finest contribution of the United States to legal science is the development of the 18th century Bill of Rights by judicial review so that it meets the needs of society 200 years on. This development is a tribute not only to the judges but to Madison, Mason and the others who contributed to the drafting of the ten amendments.

Nevertheless, at the end of the day the power to change a constitution is one to be exercised politically, not judicially. I must, therefore, impose a vital condition upon my support of a written constitution. It must be capable of modification and amendment not at the whim of a bare majority in the legislature but by a process which, while it ensures that the nation is consulted and public opinion has the chance to form, is not too dilatory or laborious. Creative judicial interpretation will help, but must not be pressed so far that it becomes a concealed legislation. The solution has to be found in a legislature which, while responsive to public opinion, values the safeguard of judicial review, and in a judiciary which understands social conditions and is capable of interpreting not only what the legislation intends but what the constitution requires.

I hope I have now made clear why I believe in a constructive partnership of the three arms of government, and why I deprecate over-emphasis upon checks and balances. The ultimate power must rest with the people. But that is not to say that the people — or, more accurately, a majority of them — are necessarily and always virtuous and wise. Though nothing can withstand a hurricane, lesser storms can be controlled by a sound constitution embodying political, administrative, and judicial safeguards. We connot build proof against the hurricane; but wise restraints and a steady judiciary can see the ship of state through all but the catastrophic tempest.

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7

PERSPECTIVES ON EQUAL PROTECTION

POLYVIOS G. POLYVIOS

1. *"Modern" constitutional adjudication*

There was a time when equality was considered as nothing more than the cry of the envious and equal protection only the last gamble of the desperate lawyer.[1] But this has now changed. Equality has emerged as the central theme of political and social discourse and egalitarianism has become the dominant force of contemporary constitutional law.[2] Even though brief and uniformative, a massive body of law has been developed on the basis of the equal protection clause and its doctrines now reach and its functions encompass not only the formal assessment of traditional legislative classifications but also broad and demanding superintendence of unmistakably substantive areas such as voting and the electoral process, the composition of schools and the structuring of municipal services, the administration of the criminal process, and many others.[3] But this is not all. Some of the recent cases, mainly American, expanding the concept of equal protection have, in terms of judicial decision-making certain extraordinary characteristics, and these cast a new light on constitutional adjudication in general. Some of the most important ones are: First, 'the (se) cases require the State to make changes in the *status quo* — some alteration of a widespread and long accepted practice, some improvement from the standpoint of human rights'.[4] Thus in both *Brown* v. *Board of Education*[5] and *Reynolds* v. *Sims*[6] the Supreme Court called for and in effect brought about fundamental changes in the political and legal structure of the United States, public institutions were radically refashioned by judicial tribunals in the light of what were perceived to be the true demands of constitutional equality, and major reforms of a striking egalitarian nature were conceived, bluntly read into the Constitution, and ruthlessly implemented. A second characteristic, of even greater potential importance, is the employment in some areas of the concept of an affirmative obligation resting upon the State to equalize essentially private conditions. Thus, at times, the command that equal treatment should be extended to all has been read not only as a ban on the creation of state-sanctioned inequalities but also as a directive that inequalities existing without the direct or indirect complicity of state agencies should likewise be eliminated;[7] this in its turn has resulted in the imposition of extensive affirmative duties upon the State, particularly in the areas of race relations, reapportionment and the enforcement of the criminal law. And, thirdly, by virtue of their recent 'positive' activities, particularly their remarkable remedial decrees ordering the reapportionment of state legislatures and the transportation of public school students, courts have come to be recognised as nothing less than aggressive participants in the political ordering of society.

The egalitarian advances of the Warren court have generally been recognized not only as desirable and indeed long overdue reforms but also as 'major accomplishments'[8] from the point of view of policy. For this they have been welcome by many. But at the same time there has been almost universal acknowledgement that the reasoning employed in the most significant of the equal protection decisions of recent years has suffered from a number of strikingly obvious defects, such as dogmatism, doctrinaire rhetoric, and a marked failure either to support results by traditional legal methods or to rationalize judgements in terms of impersonal and neutral principles ultimately referable to the constitutional text or to other equally widely accepted sources of law.[9] Some simply hold the American Supreme Court accountable for 'an increasing incidence of the sweeping dogmatic statement', for 'the formulation of results accompanied by little or no effort to support them in reason', for 'opinions that do not opine' and for 'orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree'.[10] Others go beyond this and are quite prepared to accuse the court of using 'disingenuousness and misrepresentation'[11] in order to promote the egalitarian revolution a majority of Supreme Court judges believed in. But whatever one's precise criticism of particular decisional patterns or trends, and whatever the more general merits or demerits of the specific reforms brought about by the Warren court in the name of equal protection, the questions have often been asked, and not only by unsympathetic observers, whether 'an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication',[12] whether the pronounced reliance upon courts made fashionable by the unrestrained judicial egalitarianism and activism of the 1960s may not have irremediably weakened society's political institutions, principally by eroding the people's sense of civic responsibility,[13] and whether the process of constitutional adjudication may not have become overpoliticised, with 'too much of the country's affairs (being) handled as constitutional law'.[14]

In any case the developments associated with recent interpretations of the equal protection clause and the activities of the Supreme Court thereunder have cast a new light on constitutional law, the proper or permissible role of judicial tribunals in the overall governmental scheme, and the legitimate uses of constitutional adjudication in contemporary society. 'This new dimension'[15] raises fundamental questions.

Given the extraordinary character of the questions put before the Supreme Court, can one fairly expect the court to ignore 'the political aspect(s) of its task',[16] mainly the public consequences of its decisions? Should or should not judges attempt to provide for and translate into living law, at least to some extent, 'the dominant needs of the time and the urgency of their embodiment into law'?[17] Should substantive 'progress'[18] ever be aimed at by the court in the discharge of its function of adjudication, and can results alone ever justify judicial holdings? And, more fundamentally, can or should judicial decisions ever be used as an instrument of social reform, and, if so, in what circumstances, within what limits, and subject to what safeguards? One answer, given by activist theories, is that 'law is a human instrument designed to meet men's needs',[19] that judicial tribunals must continuously seek 'to bring legal rules into consonance with the human reality to which they purport to respond',[20] that the Supreme Court should therefore play a dynamic and creative role in the regulation of social life and the shaping of the future,[21] and that in fact, in the area of equality, the Supreme Court has written 'highly responsible treatises on the legal issues coming to it',[22] serving in the process the cause of a just society and proving 'one of the great cohesive forces in America'.[23] But if, the diametrically opposed viewpoint asserts, constitutional law and judicial decisions can be used as means whereby a fairer way of life can be inaugurated and ideas of 'progress' and social justice advanced and implemented; if self-restraint and deference to the judgement of the more democratic branches of government are to be abandoned in favour of a so-called more relevant jurisprudence,[24] if the great generalities of the Constitution are given a content and significance that vary from age to age[25] depending on the particular judges' perception of society's needs and aspirations, — will not the inevitable results be, first, that judges will no longer be guided in these matters by impersonal rules of law but rather by 'personal impressions which from time to time may be shared by a majority of (them)'.[26] Second, that courts will degenerate into naked power organs whose decisions are no longer controlled by principle, and, third, that the Supreme Court itself will no longer be looked to 'as exhibiting consistency in adjudication and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion' but will instead 'itself become the breeder of fresh doubt and confusion in the public mind as to the stability of (political) institutions'?[27] These are but some of the insoluble dilemmas and problems of constitutional adjudication.

It must not of course be thought that these two uncompromising viewpoints are the only ones that can be entertained on the subjects of constitutional construction and the permissible role of courts under written charters of government. In between them lie a number of intermediate models which essentially seek to combine on the one hand the notion that adjudication must primarily consist in the enunciation of principled norms enjoying significant support in the Constitution or its essential implications,[28] or otherwise there will be judicial tyranny, with, on the other hand, the twin ideas that constitutional growth in the form of new intermediate decisional principles must be allowed to manifest itself,[29] coupled with the idea that judges and courts would be in serious breach of their duty if they failed to address themselves to the dominant needs of their time. Both these notions are capable of derivation from the often quoted and generally accepted statements that 'the constitutional instrument was not intended to provide merely for the exigencies of a few years but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence'[30] and that 'the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events'.[31] This more flexible but still rigorously principled model of constitutional adjudication was eloquently put by Judge Learned Hand, '(a) Judge must manage to escape both horns of th(e) dilemma: he must preserve his authority by cloaking himself in the majesty of an overshadownig past; but he must (also) discover some composition with the dominant needs of his times'.[32] Adoption of such intermediate models can provide no mechanical yardstick for decision, nor does it dispense with the incredibly difficult tasks of drawing lines, achieving acceptable accommodations of conflicting interests, or defining values and proclaiming principles. But it strongly insists upon certain points. First, that constitutional adjudication must be based upon the so-called rule of neutral principles,[33] second, that judicial review should basically consist 'in the principled process of enunciating and applying certain enduring values of our society'[34] which in their turn should enjoy an adequate connection with recognized constitutional materials, third, that any rules and principles which result from an intellectually coherent reading of the proper sources and which will eventually be used for the resolution of cases should always be applied in an even-handed and general manner, any reasons that are being relied upon transcending in their generality and sufficiency any immediate results and issues that may be at stake,[35] fourth, that the Supreme Court should never become, 'the partisan of a particular set of ethical opinions',[36] and fifth, that personal views of judges should never be translated into constitutional limitations, particularly in the context of large and untechnical concepts like due process and equal protection, despite the fact that it may prove unavoidable that the courts will ultimately find themselves enforcing 'permanent and pervasive feelings'[37] of society.

Obviously these themes and questions cannot be examined in the context of a brief paper. Here certain thoughts will be ventured on two important topics, first the ambiguities and difficulties of what is normally supposed to be an easy subject, classical equal protection as represented by the doctrine of reasonable classification, and secondly the doctrine of fundamental interests, this being the major component of what has come to be known, both in America and India, as new equal protection.

2. *The reasonable classification principle*

The basic principle that is now applied by courts for giving concrete meaning to the equal protection clause is the 'reasonable classification' principle, or the antidiscrimination principle, as it is sometimes called. 'Although it was once thought that equal protection required only that a given legislative classification, once made, be evenly applied',[38] for the past century or so it has been consistently held that 'the classifications embodied in a state statute must also meet the requirements of equal protection',[39] which they will only do if they are reasonable in the sense that the criterion of legislative selection bears a relationship of rationality to a legitimate state purpose. It is not clear why this 'reasonable classification' principle has been adopted as the basic decisional standard in the sphere of equal protection. For some,[40] this principle is suggested neither by legislative history nor by the constitutional text, and it is true that the Supreme Court has never taken the trouble of explaining why it has chosen this mediating rule as opposed to many others that might also be suggested. At the same time, it may be that the following reasons were instrumental, whether consciously or unconsciously, in the Supreme Court's adoption of the doctrine that legislative classifications are constitutional if adequately related to permissible state objectives. For a start, the reasonable classification principle enjoys, or at least gives the impression of so doing, a number of decisional advantages which other more direct and intuitive tests would clearly lack. It thus purports to be predominantly formal and devoid of elements of value or personal preference, it aspires to objectivity and universality of operation, and it seems to be judicially manageable, reducing the relevant constitutional inquiry to its bare essentials and only directing attention to issues of minimum correlation of ends and means. Secondly, the norm of reasonable classification appears to correspond with and reflect common ways of thought and speech concerning equality and equal treatment. Equality demands that equals should be treated equally and that similar treatment should be extended to those similarly situated. At the same time 'it was a wise man who said that there is no greater inequality than the equal treatment of unequals',[41] and '(t)he dogma of equality'[42] has not been regarded as demanding the equation of individuals unequally placed. The doctrine of reasonable classification, by demanding that state discrimination is permissible if capable of justification by the State, reconciles these two complementary positions, and moreover provides a common 'yardstick'[43] for the measurement of the rights of all. Finally, the doctrine of reasonable classification, by focusing on the position of the individual and by stressing the need for equality 'in right, in protection and in burden'[44] and among all persons, — subject only to those restrictions and state-created inequalities which in reality promote the equal protection of the laws, — presents itself as the distillation of the twin ideas of individualism and respect for persons, both intimately related to concepts of equality and justice.

These reasons, whatever their analytical imperfections, may account to a large extent for the undisputed predominance of the doctrine of reasonable classification as the basic criterion of detecting unequal and discriminatory laws. These reasons may not be as convincing as it is sometimes thought. The traditional doctrine is not always or invariably easy to apply, its decisional advantages have often been exaggerated, and its philosophical and individualistic underpinnings are neither as pure nor as coherent as some of the early commentaries imply. But these considerations have not significantly disturbed the general consensus that the main principle of constitutional adjudication under equal protection is that of reasonable classification, its standard methodology of determining the validity of state discrimination being repeated so many times that it has become one of the best known and familiar judicial techniques. This methodology, referred to as mere rationality review, consists of two steps. First one looks for a permissible state purpose which the legislature may have had in mind in enacting the challenged legislation. Second, the question is whether the legislative classifications are rationally related to the statutory purpose already identified. If they are reasonable, they are constitutional; otherwise they will be struck down as arbitrary.

The following points, most of them in attempted refutation of the alleged simplicity of the 'mere rationality' test, can be made:

First, even though there is hardly anything more usual than routine invocation of the doctrine of reasonable classification and its basic test of 'minimum rationality', there are many formulations of the traditional standard of equal protection, and 'these various verbalizations of the doctrine are not the same'.[45] One test is whether the state law or system in question has been shown to bear 'some rational relationship to legitimate state purposes'.[46] Another formulation is 'whether the challenged state action rationally furthers a legitimate state purpose or interest'.[47] The *McGowan* version,[48] often referred to in cases involving economic and business regulation, refuses to set aside statutory discriminations if 'any state of facts' can be suggested in justification, although it may be that such suggestion will have to be reasonable. Other judges have been even more deferential towards the broad powers of classification possessed by state legislatures and have refused to allow the presumption of constitutionality to be overcome except 'by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes'.[49] In some cases conclusory and peculiarly uninformative language is used to describe whether the lines drawn amount to "invidious discrimination",[50] while in numerous other opinions no particular importance is attached to the precise terminology used. 'The equal protection cases carefully analysed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational", "irrelevant", "unreasonable", "arbitrary", or "invidious".[51] But other formulations are stricter. Thus, some judicial pronouncements, both old and new, speak of a 'fair and substantial relationship'[52] between statutory purpose and challenged classification, of distinctions that must be 'consistent'[53] with the command of equal treatment. Many Indian opinions warn us that to overdo 'reasonable classification' is to undo equality, urging us to regard as constitutional only those classifications which plainly, broadly, and meaningfully advance legitimate statutory objectives. What is clear is that these various versions of the test for determining whether classifications are valid are not the same. Some are notably more lenient than others, a few consider themselves 'under a solemn duty to look at the substance of things',[54] and the *McGowan* and related formulae seem to forbid any kind of meaningful judicial investigation. At the same time all these terms and characterisations are 'vague and indefinite',[55] they do not provide either a precise formula or an easy to apply mechanism for decision, and in *most*, but by no means all cases, the choice of any particular one will not significantly distort the actual outcome. At the same time there are two vital considerations in the area of traditional equal protection on which almost all would agree (at least in theory): First, that the burden of establishing irrationality rests on the complainant and is not easy to discharge, and, second, that the unmistakable thrust of all these terms and formulations is negative and restrictive, amounting to a plain recognition of the fact that 'under a proper interpretation of the equal protection clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act'[56] and aiming to reduce 'to a minimum'[57] the likelihood that the judiciary will strike down state enactments and policies merely because of individual notions and personal predilections.

Second, since the main test developed by the Supreme Court for deciding on the validity of classifications is whether these can be deemed to be founded on and to be reasonably related to some legitimate and constitutionally permissible state purpose, one must first discover purpose, an undertaking which is neither simple nor, occasionally, vaule-free. Further, as currently accepted, there are gradations of state purposes, in terms both of their importance and of their consequential impact. Most can be called 'ordinary', and these the State can promote by its usual legislative classifications, however imperfectly drawn. But these purposes can never justify infringement of fundamental rights or employment of suspect criteria. Others are 'compelling', and these, in proper circumstances, can override the normally prior claims of fundamental interests and vulnerable groups, at least if considerable precision has been achieved in the drafting of the relevant enactments. There may also be an intermediate category of 'substantial' purposes, but this is a 'diaphanous and elastic'[58] phrase that so clearly invites the intrusion of subjective judicial preferences and prejudices relating to particular types of legislation has not as yet received much elaboration. Nor should one forget that there are purposes and goals which are totally forbidden to and cannot be pursued by the State,[59] and conversely that others have in effect become mandatory in given areas of legislative activity, of which reapportionment is the most prominent.[60] Further, much obscurity envelops both attribution of legislative purpose and attempted differentiations between the concepts of purpose, foreseeable and expected impact, and motivation, and very little is known either about the bounds of the freedom which courts enjoy in the supplying of independent goals that serve to validate disputed classifications or about whether the usual requirements of rationality and of an adequate correlation between means and possible state objectives are in ultimate analysis anything other than a disguised evaluation of 'competing public policies'.[61] Similar ambiguity lurks in other important components of the doctrine of reasonable classification, such as the concept of administrative leeway, the extent to which political considerations can intrude into the formation of legislative decisions, and the impermissibility and justiciability of certain 'wrongful' motives.

Third, another very difficult question which has not been discussed adequately relates to the very idea of rationality. What is it for a classification to be reasonable? By what standards is reasonableness to be measured? And, more precisely, what considerations can a judicial tribunal take into account in determining rationality? Here too there is much uncertainty. The following points can be made: Traditional formulations suggest that '(the) quantum of relation'[62] that is required between statutory purpose and legislative means is a small one, which can mean either that classifications may be quite overinclusive or underinclusive and still be upheld, or, more generally, that every possible allowance must be made for the disputed legislative judgement and its particular choice of remedies. The most permissive versions of the equal protection standard of scrutiny appear to demand only that there should be a higher incidence of the identified trait within the included class than the excluded one and do not investigate how 'tenuous' is the fit between trait and purpose,[63] provided of course that common sense or empirical knowledge or even legislative belief would suggest a connection between them. Stricter formulations might dismiss some correlations as unduly tenuous and demand that the State should adopt measures that clearly and 'sufficiently'[64] advance permissible objectives. Moreover, some judges do not regard with favour certain types of evidence, such as that provided by certain experimental or statistical techniques, and in many contexts will only use the evidence with extreme caution.[65]

A second important point to notice is that the more complex the needs which a statute seeks to accommodate and the more involved the situation to which the challenged legislative response is addressed the more reluctant the courts will be to demand either conformity to abstract concepts of reason or a careful drawing of the lines.[66] In complex situations numerous compromises must be made, many competing pressures simultaneously accommodated or adjusted, many local circumstances and perhaps peculiar traditions taken care of. Here, and particularly in the case of many governmental programmes enacted in response to 'practical living facts',[67] it is virtually impossible to do more than try to make sure that reason, in the sense of the absence of totally arbitrary behaviour, has not been disregarded. Reasonableness in a general sense rather than the search for a specific correlation between purpose and classification then becomes the operative criterion. But it is sometimes suggested that judicial deference should not be so marked when matters are in issue with regard to which 'the court's expertise is as great as that of any other governmental institution',[68] for instance in cases involving the rights of the indigent criminal accused. But this is difficult to fit into traditional doctrine. Judicial deference is generally regarded as based 'not on relative fact-finding competence'[69] but on due regard for the decisions of those bodies which are constitutionally appointed and meant to decide, and to suggest that arguments of supposed institutional competence should result in less deference for some legislative judgments as opposed to others is either to elevate some interests to a higher constitutional status than others without adequate constitutional justification or to change in an oblique way the relative jurisdictional ambits of legislative and judicial organs. Nor is it at all clear that criminal or any other cases in which the judiciary allegedly enjoys special expertise do not also involve the balancing of 'incommensurate interests',[70] matters as to which men of good will can and do reasonably differ and as to which the benefit of the doubt must therefore be given to legislative judgment and discretion. And yet, whatever the doctrinal difficulty of accommodating the notion of a special judicial competence to evaluate for itself certain interests, since the basic test of constitutionality is that courts can strike down laws only when it can be said 'with some confidence'[71] that the legislature has demonstrably erred in adjusting the competing claims, the legislative judgement is in practice more likely to be nullified in areas with which the judiciary enjoys special familiarity.

Fourth, one can notice that courts usually contrast legislative reasonableness with arbitrariness. This contrast too is not as clear as appears at first sight. Is the relevant distinction one between rationality and 'lunacy' or one between rationality and 'uncontrolled emotion'?[72] Neither contrast casts much light on when the court can legitimately hold laws unconstitutional as arbitrary and irrational. Legislatures almost never act in a lunatic manner, and 'uncontrolled emotion' is not easy to define or separate from permissible cognitive processes. And, in any event, why should emotion, unsupported presuppositions and all sorts of biases not be used by the legislature? One man's bias is often another man's value, and it can hardly be suggested that value judgements as such are also forbidden. No clear answer can be given to these difficult and fundamental questions. On the one hand it cannot be that legislative decisions must be capable of characterization as 'informed'[73] before they can be held to be constitutional, nor, it can confidently be said, is it be a prerequisite of constitutionality that they should first pass the test of a calm and dispassionate judgement, though some might say that the legislature must stay within the broad but by no means boundless field of 'common human experience'[74] and its allowable and defensible inferences. At the other extreme the central meaning of constitutionalism is that not all legislative decrees and enactments are to be held automatically valid simply because they are the products of democratic processes. A possible compromise, not without its difficulties, might be sketched out as follows: Rationality must be set off against 'non-rational modes like will, or power, or caprice, or emotion'.[75] Compliance with it is a warrant of the soundness not so much of the substance of a decision as of the way it was reached and the course that was pursued in reaching it, namely 'that the course of inquiry has been kept open and (has) operat(ed) in appropriate ways and within appropriate termini'.[76] Alternatively, rationality means that the results reached, whether legislative or other, have some basis 'in reality'[77] or some plausible version of it. If therefore legislative decisions have been reached by processes that can be described as rational and open, or if the decisions themselves can plausibly be supported by arguments that are not demonstrably capricious and whimsical on the basis of contemporary knowledge, current experience and common sense, then they will be held rational and constitutional. And it must be repeated once more that the burden of proving irrationality rests on those who allege unconstitutionality.

To sum up our discussion of rationality tests, particularly as they have been applied in the area of traditional equal protection, the issue is not so much whether there is a rational relationship between statutory purpose, whether actual, stated or hypothetical, and classification, either in the sense of a positive correlation between the two or in the sense of some other and more remote relationship between ends and means, but *rather* whether 'a clear mistake' in Thayer's sense[78] has been proved on the part of the State. Only when those who have the right to make laws have made not merely a mistake but 'a very clear one', 'so clear that it is not open to rational question', can or should the courts intervene.

3. *Fundamental interests*

In most jurisdictions where the equal protection of the laws is one of the constitutional guarantees, the doctrine of reasonable classification is the only acknowledged principle of decision. This was also the case with the United States until the late 1960s, with the obvious and historically justified exception of race. Until then, in other words, the only *values* equal protection clearly embodied were rationality and generous protection for the black race. But since then substantive *rules* and *doctrines* other than reasonable classification have emerged as additional *principles* for giving concrete (and reinforced) meaning to the constitutional ideal of equality. The principal of these are the doctrines of fundamental interests and of suspect classifications. The first is the most controversial.[79] It asserts that if a law encroaches upon a fundamental personal interest it is not enough that the law is rational and non-invidious, i.e. it is not enough that the law satisfies traditional standards of mere rationality, but the State must show that the law is *necessary* for the achievement of *compelling* governmental interests. The law, in other words, must be not only rational but essential. Application of this standard usually ensures the invalidation of laws as unequal and unconstitutional, in worked contrast to the test of mere rationality.

The concept of fundamental interests is now a well-established feature of American constitutional law.[80] As recent formulations would have it the rights and interests which have definitely been held to be fundamental in an equal protection sense are — in addition to the established rights explicitly mentioned in the Constitution, such as free speech, association and the like — procreation,[81] the right to vote,[82] the interest of an accused in adequately defending himself,[83] and the right of free travel.[84] But despite recent cases which have, for the time being at least, settled a number of points two main questions must still be posed and answered. First, is it proper to have a doctrine of fundamental interests entailing strict scrutiny of legislation as a component of equal protection? Secondly, assuming that it is proper, how should one determine which are these fundamental interests which deserve special protection in terms of the guarantee of equal treatment? Paradoxically, it may be preferable to tackle the second question first.

Over the years a number of different approaches to the problem of how to determine fundamental interests in the context of equal protection have been propounded and supported by courts and academic commentators. The first approach can be called the activist one. This accepts the substantive character of new equal protection, welcomes, '(t)hese new perspectives on the Equal Protection Clause',[85] and strongly supports a vigorous role for the judiciary in an era of positive government. On this approach the task of selecting fundamental interests must necessarily be discharged by the Supreme Court and other judicial tribunals, needs that are 'basic' must be satisfied, and those interests which 'carry relatively high priorities for the development of the nation's underdeveloped sectors' and are particularly important for those who are specially disadvantaged must be aggressively promoted. There will be much uncertainty, but this is inevitable. Equal protection, no less than due process, must follow 'the advancing standards of a free society as to what is deemed reasonable and right', notions about what amounts to equal treatment will change, and constitutional adjudication in the final analysis is but 'a process of growth' in the course of which inescapably and 'properly' the various generations of judges must seek to give concrete meaning to the moral commands of due process and equal protection from their own collective wisdom. The problems of substantive due process, in other words, will always be with us, and there can be neither an escape from nor indeed an answer to accusations of engaging in a 'natural law due process philosophy'. Even though it is doubtful if many would go this far and in effect allow the judiciary to write their own preferences into the Constitution in so blatant a fashion, the exponents of the activist thesis have admittedly and unashamedly not devoted much attention to the needs of coherent doctrinal development or the demands of principled explanation. 'But what,' they ask, 'is the test of a good opinion?' Apparently neither 'exhaustive demonstration of support in yesterday's precedent' nor 'painstaking' analysis but rather conformity with a developing idea of progress and vindication by tommorrow's history. 'After all, how many great decisions have come equipped with great opinions?'

The next model as to how to locate fundamental interests has been associated with the name of Justice Marshall.[86] This concedes that 'the process of determining which interests are fundamental is a difficult one', but does not think that 'the problem is insurmountable' and certainly does not accept the view that the process of selection need, degenerate into 'an unprincipled (and) subjective "picking-and-choosing" between various interests'. This theory starts with a declaration of faithful fidelity to the Constitution by asserting that 'the determination of which interests are fundamental should be firmly rooted in the text of the Constitution', but then expresses willingness to go well beyond what a fair reading of the constitutional text and its implications might suggest as its outer parameters. It apparently conceives of its task as the determination of 'the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution'. If constitutional rights are found to be 'dependent' on interests not so enumerated, the latter should also be held eligible for the benefits of the 'compelling interest' test and reinforced judicial scrutiny. In other words, the central proposition, according to this theory, which both explains the court's prior cases and should also guide the judiciary in the definition of further basic rights is that ' "fundamentality" is, in large measure, a function of the right's importance in terms of the *effectuation* of those rights which are in fact constitutionally guaranteed'. Thus, '(a)s the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly'. It is only such an open-ended and flexible approach, Justice Marshall's thesis maintains, which can alone explain and unify *Skinner* v. *Oklahoma*, the procreation case, *Reynolds* v. *Sims* and the other voting cases, *Griffin* and *Douglas,* the criminal process cases, and *Shapiro* and the many other holdings on the right to travel. These were all instances in which 'due to the importance of the interests at stake' — mainly in terms of the effectuation of constitutional values — the Court displayed concern with state discriminatory treatment transcending that exemplified by the mere rationality standard. It cannot thus be said that interests such as procreation, the exercise of the right to vote in state elections, the right to travel, or the right of access to criminal appellate processes — the only rights which are certainly fundamental interests — are directly guaranteed to the citizen by the Constitution. And yet all were accorded special judicial consideration 'because they are, to some extent, *interrelated* with constitutional guarantees'.

A third model, which is the one adopted by the Supreme Court in *San Antonio School District* v. *Rodriguez,*[87] denies that the courts should be empowered or allowed to create substantive constitutional rights and concepts in the name of the equal protection of the laws, but seeks the answer to whether an interest is fundamental for equal protection purposes in whether the relevant right is 'explicitly or implicitly guaranteed'[88] by the Constitution. The court, in other words, should *simply recognize established* constitutional rights and extend to them the required protection entailed by the application of strict scrutiny and the effective reversal of the presumption of constitutionality *under both* due process and equal protection, and neither embark upon comparisons of the relative social significance of particular services or activities as opposed to others nor weigh the relative merits and importance of asserted interests. Not surprisingly this point of view claims to derive strong support from a consideration of the undoubted dangers that would attend any large-scale judicial expansion of the category of fundamental rights. Thus, unless the Supreme Court remains tied to the constitutional text and refuses to elevate to the constitutionally favoured status of basic rights interests and needs not somehow emanating from, guaranteed by and independently protected under the Constitution, its decisions will not easily escape an appearance of subjectivity, charges of acting like a super legislature will be more frequent as well as more plausible and difficult to resist, and in all likelihood judicial power will eventually, and whatever the protestations to the contrary, be used to deprive the political institutions of vital control over policies. Added support for this final theory is claimed to come from the prevalent conception of the Constitution as a basic charter of government under which certain rights were selected for protection against majoritarian abuse whilst all other matters must be deemed to come under the traditional police power of the State.[89] There can of course be little doubt that adoption of this model by no means solves all difficulties. Even its strongest proponents admit that 'the determination of the extent to which a right is protected may well result in the drawing of fine lines'[90] and it is apparent that reference to rights which are 'implicitly' guaranteed and protected by the Constitution as well as to those which enjoy an explicit footing in its text opens this model too, perhaps no less or only slightly less than the preceding one, to difficult questions of degree. But, in theory at least, the fact that 'the fundamental sanction of the right itself'[91] must either be found in the language of the Constitution or be traceable to its 'implications' goes a not inconsiderable way towards reducing judicial interventionism and ensuring the retention of essential links between the Constitution and the court's jurisprudence.

But three further weaknessees of this model as a charter of adjudication must be noticed. First it does not explain satisfactorily all the cases. or, particularly, the way they were decided. Where, it has been asked,[92] does the Constitution guarantee even implicitly the right to procreate? Similarly, the right to vote in state elections appears to have been recognized as a 'fundamental political right' not because it is guaranteed by the Constitution, however remotely or indirectly, but because the court concluded at an early stage that it is of basic significance for the preservation of other rights; and if this final model asserts that fundamental rights must be guaranteed by the Constitution *independently of the equal protection clause,* the source of such a right is not easy to perceive. It appears instead more accurate as well as more realistic to acknowledge that 'the final source of protection from inequality in the provision of the state franchise is (none other than) the Equal Protection Clause'.[93] It is likewise true that a State is not under federal constitutional duty to set up appeal courts or to provide an appellate process but, nevertheless statutory classifications or even *de facto* differentiations adversely affecting access to the appellate process a State has chosen to provide have invariably triggerred close judicial scrutiny. Is this because of some explicit or implicit guarantee in the Constitution or because of the importance of the rights at stake? It seems that *Griffin, Douglas* and similar cases can best be understood 'as premised on a recognition of the fundamental importance' of the criminal process in general and the criminal appellate one in particular.[94] For these reasons Professor Cox[95] has rejected this third model as unduly rigid, pointing out that in truth '(o)nly the Equal Protection Clause protects the right to vote. The right to procreation (is) protected by the Equal Protection Clause . . . only because the Court chose thus to recognise (it)'. The court, this particular criticism concludes, should not therefore be artificially restricted by a narrow formula that cannot even explain all the past cases. A second objection to the theory that the answer to whether interests are fundamental for purposes of equal protection analysis is 'always' determined by whether that interest is a right explicitly or implicitly guaranteed by the Constitution is that it may well render 'the established concept of fundamental interests in the context of equal protection . . . superfluous'[96] since the existence of a substantive constitutional right would itself require that statutory classifications restricting or denying access to that particular right should be carefully scrutinized. But this may prove to be not so much an objection to a restricted and constitutionally grounded theory of fundamental rights as a persuasive objection to *any* theory of fundamental rights in the context of equal protection and in truth a strong, traditional argument in favour of confining the equal protection clause to an assessment of the constitutionality of classifications by reference to the established criterion of mere rationality. The third and final weakness of this model is again said to be its essentially open-ended nature. It is thus not clear how far it is a static one or can be expanded further by the recognition of new fundamental interests. Some of the rights now established as basic are only so regarded because they have been *traditionally* recognized as rights of 'constitutional significance'[97] and because their 'constitutional underpinnings,[98] can no longer be doubted. This is particularly so with the right to travel and, to a lesser extent, with the right to equal treatment in the structuring of the voting process. But is this not saying that *tradition* can constitute adequate grounds for recognizing rights and elevating them to the inner category of fundamental ones, and if it can establish and so dignify one right, why could it not establish and result in added protection for others as well? And, if so, what and how much evidence of observance is needed before the requisite constitutional tradition can be established? This objection, too, can by no means be considered conclusive. Uncertainty will persist whichever model is adopted. In fact, if one thing is clear, it is that difficulties, and not dissimilar ones at that, will arise as soon as one proceeds beyond a very limited conception of equal protection, perhaps if one decides to have *any* kind of fundamental rights doctrine or at least one that will not be rigidly confined to the literal text. If one does so, whether one insists that those interests which are to be accorded especially solicitous protection should have a solid basis of *some sort* in the constitutional text or one adopts some slightly different formulation, and particularly if one is prepared to go further and dispense with the necessity for discovering some demonstrable connection between the particular interest asserted and the Constitution, only requiring a functional interdependence or a so-called intimate interrelationship between what is claimed and what is constitutionally protected, difficulties of adjudication and dangers of judicial abuse will remain. Nor for that matter would a decision to adhere closely to the Constitution and refuse to elevate any interest not appearing in it to the exalted status of a fundamental right particularly hamper the activist judge. An expansive reading of the specific provisions of the Constitution can yield almost any desired result, a number of concepts currently in fashion such as 'penumbras', 'peripheries', 'emanations' and 'implications'[99] are particularly amorphous and therefore easily manipulated by those who believe that 'judges too must be dynamic components of history,[100] and finally, with special reference to the Marshall thesis of 'interrelationship', most of the rights explicitly mentioned in the Constitution can be seen, particularly if some imagination is used and if what is stressed is not their *position* in the original understanding but their *meaningful* exercise in contemporary society, not only as dependent on others but also as deriving their strength and continued vitality from the positive protection and cultivation of other interests. In other words, both the Marshall model and the one stressing explicit or implicit derivation from the Constitution are open-ended, the former of course much more so. The same also holds true of penumbral, structural and other such approaches. This does not of course mean that the task of adjudication must be abandoned to the mercy of absolute formulae. It only affirms the soundness of the view that, in ultimate analysis, there can be no substitute for judicial self-restraint.

The last two objections to the third model of determining fundamental interests bring us to the first and more significant of the two issues set out above, whether a doctrine of fundamental interests in an equal protection context is justifiable in the first place. The most important points to notice are the following: To begin with, the emergence of new equal protection is best explained not by considerations inherent in the concept of equality itself, whether philosophical or constitutional, but by reasons distinctive to the American scene. There is first of all the historical reason that the due process clause of the Fourteenth Amendment, the more obvious constitutional provision of enforcing individual rights, was the vehicle through which the 'conservative' majority of the Supreme Court during the early days of the New Deal attempted to stifle essential reforms by the entrenchment of *laissez-faire* economic views into fundamental law. Since therefore the due process, as a libertarian instrument, was a weapon scarred in the defence of property, it was hardly likely that the 'liberal' Supreme Court of the 50's and 60's (the Warren court) would attempt to resurrect it, even for a different purpose and in defence of a perhaps more respectable and fashionable class of rights. Substantive due process, in other words, had a bad reputation, and no modern liberal judge would openly engage in substantive due process adjudication. In contrast, at the time, equal protection was a harmless looking doctrine that was not burdened by the unpopularity of earlier judicial excesses. It was therefore the obvious alternative to which to resort, once it was decided that the wisdom, need or appropriateness of legislation in the economic and business fields would no longer to be the court's concern and that debatable issues as regards business, economic and social affairs should be left to legislative decision but that there would at the same time be intensified scrutiny of enactments apparently jeopardizing 'fundamental liberties and rights'. In addition to historical reasons, there are also what can be called the textual characteristics of the American Constitution itself. It thus contains neither a systematic enumeration of rights nor direct provision for the application of those rights that are mentioned to the States. This has the result that one must find a vehicle both for the elaboration of new rights and for the 'transmission' of 'existing' rights to the States; and since due process, for the reasons we have already set out above, was inappropriate (mainly for the protection of rights not explicitly mentioned in the Constitution) the equal protection clause was the obvious alternative. But these considerations show that the doctrine of fundamental interests is a peculiarly American notion that was first developed in response to specific historic circumstances and which was in effect necessitated by the distinctive character of the American Constitution. Similar circumstances do not exist in other jurisdictions with equal protection clauses, like India or Cyprus, and it is therefore highly questionable whether the introduction of this branch of new equal protection is warranted.

On this (traditional but now minority) view the constitutional scheme can be set out as follows: The function of the equal protection clause is neither to protect interests or rights, whether fundamental or not, nor to curtail the ambit of legislative power by a diminution of its scope, by designating, that is, certain possible ends or objectives of governmental power as illegitimate and therefore as forbidden. The concern of equality guarantees is only with the rationality of legislative classifications, and therefore the relevance and applicability of equal protection clauses are exhausted if the invalidity of such classifications has not clearly been proved by a demonstration of their arbitrariness. Substantive interests and rights must seek protection elsewhere. Where? The answer must surely be: in those provisions the *purpose* of which *it is* to protect rights and interests, whether specific, like the guarantees of free speech and association and those embodying the right to travel and rights to property, or general (if such exist), like the due process clause. What if a classification is alleged to infringe a protected right, whether this ultimately derives from the more specific constitutional provisions, in most systems the only possible ones, or the independent generalities of due process, as in America? The answer again must be that *in all cases* where *the nature* of the right or interest forms part of the complaint it is the specific constitutional provisions themselves or due process rather than equal protection that should be resorted to. One can of course say that if it is a classification rather than a uniform burden that is alleged to infringe a protected right the classification should first be tested under the equal protection clause; only if it is upheld as rational should one proceed to evaluate the challenged law under the particular provision, for instance the guarantee of free speech or the article, where it exists, protecting the right to travel. But since a classification limiting a protected right that is irrational under the equal protection clause will certainly be found to offend the clause conferring the right itself nothing is gained from first testing the impugned classification under the guarantee of equal treatment. Equal protection, in other words, must remain completely value-free, with the obvious exception of cases where the intent of the framers indicates otherwise, as is the case with racial distinctions in America.

4. *Function of the judiciary*

Why, one can now ask, *should* the guarantee of equal protection remain value-free, and why should it not become a kind of umbrella sheltering substantive values and interests thought (by the judiciary) to be particularly important, as in America? Obviously the answer to this will ultimately depend upon one's view of the function of the judiciary in society (and, it must be said, the *particular* society one is examining). But there are two points one *can* make in response to these questions. To begin with, one does not argue that provisions guaranteeing freedom of speech should also protect the right to travel. It is instead accepted that the balance and functional efficacy of the overall constitutional scheme are best preserved by a satisfactory and principled demarcation of the scope and ambit of the various constitutional articles. In this same way, but of course much less obviously, the equal protection clause cannot be allowed to perform general roving functions but its scope must be delineated bearing in mind the need to maintain internal consistency by sketching out the zones and penumbras of the various constitutional provisions in a way that minimises their confusing interaction. If therefore a right is protected independently, whether directly or by sufficient implication, there is no need to resort to the equal protection clause since adequate protection can be assured otherwise. If on the other hand a right does not have independent sanction elsewhere in the Constitution it was not presumably the intention of its framers that it should be protected. As

Justice Harlan asked (and this applies with even greater force to constitutional systems like India and Cyprus where the systematic and careful enumeration of rights shows that much thought was devoted to the question of what personal interests should be protected from the State), when a statute affects matters not mentioned in the Constitution, and is not arbitrary or irrational (in which case the equal protection clause applies), what is it that entitles a court of review to pick out particular human activities, interests or concerns, characterise them as fundamental and give them added protection under an unusually stringent and demanding equal protection test, which results in the invalidation of much legislation? It cannot be the intent of the framers; it must therefore be a theory that judges know best, not one to be adopted with equanimity in the modern political setting.

The second point that can be made is related to the one we discussed: If fundamental rights and interests can legitimately be protected under the equal protection clause (and if the rights to be protected are not to be confined to the ones specifically enumerated elsewhere) how will such rights and interests be determined? The problem of constitutional uncertainty, is of course a perennial one, and one that cannot be solved either by protestations of objectivity, however sincere, or by the adoption of simplistic strict constructionist models. But when one is interpreting a provision guaranteeing a certain right, say freedom of speech or the right to travel or the right to follow the calling of one's own choosing or the right to enter into contracts, one has a definite starting point, a roughly demarcated area of discourse, and much accumulated wisdom and learning from which to draw about extent, scope and implications; one is not operating in a vacuum. But how are courts to know when they are dealing with a fundamental personal right under the equal protection clause? If severe personal detriment to the individual is accepted as the most promising theme, both for explaining the precedents and for guiding future developments, where is the logical stopping point? If comparison of interests in terms of their importance is the appropriate criterion for elevation to the status of constitutionally protected interests, should not the interest in food, shelter, medical aid, education and other so-called necessities of life also be brought within the inner circle of fundamental rights? Can one doubt that nothing is of greater importance to the individual and to the viability of a free and democratic society than access to the basic means of subsistence? And if some notion of social value or some conception of the just society is instead chosen as the main decisional instrument for detecting basic interests, the many difficulties, far from being reduced, multiply. In any case, should such determinations be left to judges? Does this not give them unlimited power to strike down laws which seem to them unwise or improvident? And does not this expansive view of equal protection set judges at large, allowing them to substitute their judgement for that of the surely more appropriate political branches?

For all these reasons there is little doubt that the emergence in some quarters of an expansive view of equal protection premised on the doctrine of fundamental interests carries the seeds of widespread judicial interference with political processes and can only be explained by reference to the surely discredited notion that courts possess a peculiar wisdom all of their own with which to provide solutions to difficult contemporary problems. Nor can one derive, much solace from the consideration that the values modern courts are enforcing are 'liberal' and presently fashionable ones, like privacy or equality, instead of the 'outmoded' economic freedoms that appealed to earlier generations of judges. The point remains: Aggressive promotion by the judiciary in the name of the 'living Constitution' of certain values which find no *plausible support* either in the Constitution or in irresistible inferences from it poses a serious threat to the credibility of democratic institutions and the vitality of a free people.

To conclude, it is respectfully suggested that in jurisdictions like India or Cyprus or others where there is an enumeration of personal rights there should be no doctrine of fundamental interests in an equal protection context demanding application of tests other than mere rationality on account of the nature of the right at stake. In so far as a right or interest is mentioned in the Constitution, the doctrine of fundamental interests is *unnecessary* because adequate protection can be assured by testing the constitutional adequacy of the challenged provision, whether a direct uniform burden or a classification, by reference to the relevant clause protecting the right itself. In so far as a right or interest is not mentioned, the fundamental rights doctrine is *undesirable* because at the end of the day it will allow judges to rule not by principled judicial declaration but by quasi-legislative fiat.

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27. *Smith* v. *Allwright,* (1944) 321 U.S. 649, 670, per Roberts, J.
28. See, generally, Bickel, *The Least Dangerous Branch, supra* note 9.
29. See, particularly, an unpublished dissenting opinion of Brandeis, J., quoted by Bickel, *supra* note 18 at 20. 'Our Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth — of expansion and of adoption to new conditions. Growth implies changes, political, economic, and social. Growth which is significant manifests itself rather in intellectual and moral conceptions than in material things'. The case was *United States* v. *Moreland,* (1922) 258 U.S. 433.
30. *Martin* v. *Hunter's Lessee,* (1816) 1 Wheat. (14 U.S.) 305, 326, per Story, J.

31. Jackson, *The Struggle for Judicial Supremacy* (1941), 174.
32. Hand, 'Mr. Justice Cardozo', (1938-39) 52 *Harv. L. Rev.* 361.
33. There is a vast literature on the issues of the requirement of neutrality in constitutional adjudication and the desirability (and indeed feasibility) of any such element. See particularly Bickel, *The Least Dangerous Branch, supra* note 9 at 49-65; Shapiro, *Law and Politics in the Supreme Court* (1964), 1-49; Deutsch, 'Neutrality, Legitimacy, and the Supreme Court', (1967-68) 20 *Stan. L. Rev.* 170.
34. Bickel, *The Least Dangerous Branch, supra* note 9 at 58.
35. See H. Wechsler, *Principles, Politics and Fundamental Law* (1961), 5, xiii-xiv.
36. These are the words of Holmes, J., quoted by Wechsler, at 27-8.
37. *Solesbee* v. *Balkcom*, (1949) 339 U.S. 9, 16, per Frankfurter, J., dissenting.
38. See *Oregon* v. *Mitchell*, (1970), 400 U.S. 112, 241 per Brennan, J.; *Hayes* v. *Missouri*, (1886) 120 U.S. 68, 71-2; *Powell* v. *Pennsylvania*, (1888) 127 U.S. 678, 687; per Harlan, J.; Tussman and ten-Broek, 'The Equal Protection of the Laws', (1948-49) 37 *Calif. L. Rev.* 341, 345.
39. *Oregon* v. *Mitchell*, *id.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 189-91; *Williamson* v. *Lee Optical Co.*, (1955) 348 U.S. 483; *Kotch* v. *Board of River Port Pilots*, (1947) 330 U.S. 552.
40. Fiss, 'Groups and the Equal Protection Clause', (1975) 5 *J. Phil. & Pub. Aff.* 107, 118 *et seq.*
41. *Dennis* v. *United States*, (1951) 339 U.S. 162, 184, per Frankfurter, J.
42. Holmes, *The Common Law* (1938), 43.
43. *Byers* v. *McAuley*, 149 U.S. 608, 628, per Shiras, J.
44. *Magoun* v. *Illinois Tr. & Sav. Bank*, (1896) 170 U.S. 283, 301, per Brewer, J.; see also Douglas, *We the Judges* (1956), 409; Cardozo, *Law and Literature* (1931), 109.
45. Forum, 'Equal Protection and the Burger Court', (1978) 2 *Hast. Const. L.Q.* 645, 647.
46. *San Antonio Independent School District* v. *Rodriguez*, (1972) 411 U.S. 1, per Powell, J.
47. *Ibid.* See also *McGinnis* v. *Royster*, 93 S. Ct. 1055 (1973).
48. *McGowan* v. *Maryland*, (1961) 366 U.S. 420.
49. *Madden* v. *Kentucky*, (1940) 309 U.S. 83, 87, 88.
50. This was a favourite term of Douglas, J's. Normally the word 'invidious' is used interchangeably with 'arbitrary' or 'irrational': see *Harper* v. *Virginia Bd. of Elections*, (1966) 383 U.S. 663.
51. *Harper* v. *Virginia Bd. of Elections*, *id.* at 673 *et seq.*, per Black, J., dissenting.
52. *F. S. Royster Guano Co.* v. *Virginia*, (1919) 253 U.S. 412, 415; *Reed* v. *Reed*, (1972) 404 U.S. 71.
53. *Reed* v. *Reed*, *ibid.*
54. *Mugler* v. *Kansas*, (1887) 123 U.S. 623.
55. *Harper* v. *Virginia Bd. of Elections*, *supra* note 50 at 674, per Black, J., dissenting.
56. *Ibid.*
57. *Harper* v. *Virginia Bd. of Elections*, *supra* note 50 at 681, per Harlan, J., dissenting.
58. *Craig* v. *Boren*, (1976) 97 S. Ct. 451, per Rehnquist, J., dissenting.

59. 'Note, Legislative Purpose, Rationality, and Equal Protection', (1972-73) 82 *Yale L. J.* 123, 139; Tussman and ten-Broek, 'The Equal Protection of the Laws', (1950) 38 *Calif. L. Rev.* 341, 353 *et seq.*; 'Developments' *supra* note 2 at 1077 *et seq.*
60. 'Note', *id.* at 151; see *Reynolds* v. *Sims*, (1964) 377 U.S. 533; *Lucas* v. *Forty-fourth General Assembly of Colorado*, (1964) 377 U.S. 703; *Gray* v. *Sanders*, (1963) 372 U.S. 368.
61. 'Note', *supra* note 59 at 154.
62. Kwasnick, 'A Question of Balance: Statutory Classifications Under the Equal Protection Clause', (1973-74) 26 *Stan. L. Rev.* 155, 156 n. 9; *McGowan* v. *Maryland*, *supra* note 48 at 425.
63. See John Hart Ely, 'The Constitutionality of Reverse Racial Discrimination', (1973-74) 41 *U. Chi. L. Rev.* 723, 727 n. 26; Greenawalt, 'Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions', (1975) 75 *Colum. L. Rev.* 559; *Craig* v. *Boren*, *supra* note 58.
64. *Craig* v. *Boren*, *supra* note 58 per Rehnquist, J., dissenting.
65. *Ibid.*, where statistical evidence that was far from trivial was not viewed as offering a satisfactory answer to the equal protection problem presented.
66. *McGowan* v. *Maryland*, *supra* note 48 at 524, per Frankfurter, J., concurring; see also *Tigner* v. *Texas*, (1940) 310 U.S. 141, 147.
67. *Ibid.*; see also *Goesaert* v. *Cleary*, (1948) 335 U.S. 464.
68. 'Developments', *supra* note 2 at 1128.
69. *Oregon* v. *Mitchell*, *supra* note 38 at 207, per Harlan, J., partly concurring and partly dissenting.
70. *Ibid.*; see also L. Hand, *The Bill of Rights*, *supra* note 13 at 50-1.
71. *Oregon* v. *Mitchell*, *supra* note 38 at 207, per Harlan, J.
72. Bickel, *The Least Dangerous Branch*, *supra* note 9 at 41 *et seq.*
73. *Ibid.*
74. *Ibid.*
75. Freund, *On Law and Justice* (1968), 64.
76. *Ibid.*
77. *Bickel, The Least Dangerous Branch*, *supra* note 9 at 226.
78. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law', (1893-94) 7 *Harv. L. Rev.* 129, 144.
79. See Polyviov, *The Equal Protection of the Laws* (1978).
80. For India, see *State of Gujarat* v. *Shri Ambica Mills*, (1974) 4 S.C.C. 656, 677; A.I.R. 1974 S.C. 1300.
81. *Skinner* v. *Oklahoma*, (1942) 316 U.S. 535.
82. *Reynolds* v. *Sims*, (1964) 377 U.S. 533.
83. *Griffin* v. *Illinois*, (1956) 351 U.S. 12; *Douglas* v. *California*, (1963) 372 U.S. 353.
84. See *Shapiro* v. *Thompson*, (1969) 394 U.S. 618.
85. See particularly Karst and Horowitz, '*Reitman* v. *Mulkey*: A Telophase of Substantive Equal Protection', (1967) *Sup. Ct. Rev.* 39; Karst, 'Invidious Discrimination', (1968) 16 *UCLA L. Rev.* 716. The quotations with regard to this first approach come from these two articles.
86. As set out in a number of cases, principally in *Dandridge* v. *Williams*, (1970) 397 U.S. 471 and *San Antonio School District* v. *Rodriguez*, (1973) 411 U.S. 1.
87. *San Antonio School District* v. *Rodriguez*, *ibid.* per Powell, J.
88. *Ibid.*

89. See *Weber* v. *Aetna Casualty Co.*, (1972) 406 U.S. 164, 177, per Rehnquist, J., dissenting; *Dandridge* v. *Williams*, 397 U.S. 471; *McGowan* v. *Maryland*, *supra* note 48; *United States* v. *Butler*, 297 U.S. 1 (1936); *Shapiro* v. *Thompson*, *supra* note 84 at 655, per Harlan, J., dissenting.
90. *Weber* v. *Aetna Casualty Co.*, *id.* at 179 per Rehnquist, J., dissenting.
91. *Ibid.*
92. *San Antonio School District* v. *Rodriguez*, *supra* note 86 per Marshall, J., dissenting.
93. *Ibid.*, *cf.*, *Yick Wo* v. *Hopkins*, (1886) 118 U.S. 356; *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Oregon* v. *Mitchell*, *supra* note 38.
94. This is how Marshall, J. explains *Griffins*, *supra* note 83 and *Douglas*, *ibid.* in *San Antonio School District* v. *Rodriguez*, *supra* note 86.
95. Cox II, *supra* note 2 at 73.
96. See the judgment of Marshall, J., dissenting, in *Rodriguez*, *supra* note 86.
97. See the majority opinion of Powell, J. in *Rodriguez*, *supra* note 86; see also *United States* v. *Guest*, (1966) 383 U.S. 745, 757-9; *Oregon* v. *Mitchell*, *supra* note 38 at 229, 237-8.
98. *Ibid.* Thus, even though 'the right to vote in state elections is nowhere expressly mentioned' (*Harper* v. *Virginia Bd. of Elections*, *supra* note 50 at 665), a number of cases make it clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction (see particularly *Oregon* v. *Mitchell*, *supra* note 38 at 138-44, per Douglas, J.; *Bullock* v. *Carter*, (1972) 405 U.S. 134, 140-4; *Williams* v. *Rhodes*, (1968) 393 U.S. 23, 29, 30-1; *Reynolds* v. *Sims*, *supra* note 82 at 554-62; *Gray* v. *Sanders*, *supra* note 60; *Dunn* v. *Blumstein*, (1972) 405 U.S. 330, 336)
99. See *Griswold* v. *Connecticut*, (1965) 381 U.S. 479.
100. W. Douglas, *Stare Decisis* (1949), 12.

8

JUDGES AND STATUTORY INTERPRETATION

A Note on *United Steelworkers* v. *Weber*

ARCHIBOLD COX

I

Few tasks of the conscientious appellate judge can be as puzzling as the interpretation of a major piece of legislation that bears upon an important and controversial question of public policy yet fails to provide a tolerably clear answer in the words. In such a case the judge must not only determine whether and how he will seek to discover any legislative intent not disclosed by the words, but he must fix the limits of his own commission by deciding how far and on what basis he may properly read his own views of policy into the uncertain statutory terms.

In the United States, as in India and the United Kingdom, the role of the judge, while final is in a sense subordinate. He must apply the law made by the people's elected representatives not only when the meaning of the words which they enact is plain but even when the intent is fairly discoverable apart from ambiguous words. I use the word "intent" to refer to a particular application of the statute which the legislators who composed the majority may be shown to have consciously foreseen, and also to refer to the specific application of a general, more pervasive purpose which the interpreter finds the legislature would have ordained if it could have foreseen and resolved the particular controversy. In the United States, unlike India and the United Kingdom, the federal judge may search for this intent in the reports of legislative committees and even the reports of the debates in the Senate and House of Representatives. How he will use these materials, what reliance he will put upon them, are questions of judgment for which no formula has been developed.

Even when legislative history is available in addition to the words, the search for legislative intent may sometimes be exhausted without finding an answer to the particular question before the court, and the opposing answers preferred by the parties may be entirely consistent with what is discoverable concerning the meaning of the statutory words and the underlying affirmations and limitations of legislative purpose. The point at which this question arises is no more distinct than the line between the light of day and the dark of night, but whenever it be located, the question arises, how now is the judge to decide? To what standards or sources of decision should he look? Should he resolve the policy question on its merits as if he were the legislature? If not, how should he decide?

Such questions concerning the nature of the judicial process in the interpretation of statutes lie behind the opinions delivered in the Supreme Court of the United States in *United Steelworkers* v. *Weber*.[1] The issues arose in the highly important and emotion-charged field of affirmative action, *i.e.*, of race--conscious programmes for enlarging the opportunities of minorities seeking housing, employment or higher education. Although the relevant statute and immediate context are specifically American, the problems of affirmative action and judicial philosophy have a broader interest.

II

During the last three decades the progress towards racial and sex equality in the United States has been marked by three overlapping phases.

During the first phase, symbolized by the decision in *Brown* v. *Board of Education*,[2] all State imposed racial segregation of minorities and other official hostile discrimination was outlawed by court decisions under the constitutional guarantee of "equal protection of the law".[3]

Next, private, *i.e.*, non-governmental, discrimination against blacks and other minorities was attacked. The principal achievement was the enactment of the Civil Rights Act of 1964,[4] which forbade discrimination against any individual because of race or colour under any programme to which the federal government contributes financial support, including educational institutions, or in employment.

The third phase of the search for equality was affirmative action. It was introduced by President Johnson's address at Howard University in June 1965.

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.
>
> . . . We seek not just legal equality but human equality, not just equality as a right and a theory but equality as a fact and as a result.

Thereafter executive orders were entered,[5] legislation was enacted,[6] and many private, *i.e.*, non-governmental, programmes were adopted[7] calling for race-conscious preferences designed to draw more members of minority groups into the mainstream of opportunities in American life.

Affirmative action programmes provoke intense controversy. All contend for equality but fall to quarrelling about its meaning. Nearly all Americans, regardless of race, colour, religion or national origin, measure "equality" in terms of the treatment accorded to individuals, not ethnic groups. Nearly all agree that the *ideal* of equality demands that men and women be judged upon individual performance, and that they be selected for opportunity, if selection is necessary, upon individual accomplishment or demonstrated promise, or even upon some neutral rule of thumb like seniority, but not upon irrelevancies like race, colour, national origin or sex.

President Johnson forthrightly rejected the ideal definition of equality as an operative political principle for the 1960's. He was not a Platonist. Like other proponents of affirmative action, he might have recalled Aristotle's advice:

> In the field of moral action, truth is judged by the actual facts of life, for it is in them that the decisive element lies. So we must examine the conclusions we have reached so far by applying them to the actual facts of life; if they are in harmony with the facts, we must accept them, and if they clash, we must assume that they are mere words.[8]

One of the actual facts of life is that even if all further hostile discrimination instantly ceased, the momentum of the past — the attitudes, the isolation and the built-in, facially non-discriminatory rules — would have continued until some distant future to exclude blacks and certain other minorities from higher education, skilled jobs and other opportunities in the mainstream of American life.

Equality of opportunity defined in terms of present realities thus conflicts with the long range ideal.

Affirmative action programmes may also be questioned upon the pragmatic ground that they create difficulties in realizing the ultimate ideal. To make race a factor in some decisions runs the risk of arousing race-consciousness. To allocate opportunities partly with an eye to race may encourage all groups to demand their ethnic allocations without regard to individual worth. Should society be permanently organized upon such a basis? It hardly needs saying that if you become no. 5490 Black, or no. 1369 Anglo, or no. 888 Italian, or no. 8591 Hindu, you become less human. You lose individuality, and therefore lose both dignity and worth. If we start down this road out of present practicality — if we submerge the ideal — how and when can we stop?

Yet one also must ask, what about the dangers and the wrongs in doing nothing to counteract the present, real inequalities which vex society and do injustice to individuals in consequence of the racial discrimination of the past? Particularly, would not continuing neglect of practical inequality rob the ideal of life and meaning?

This division of opinion led to litigation testing the legality of sundry forms of private and official affirmative action. *United Steelworkers* v. *Weber*[9] holds special fascination for students of the judicial process because of the questions it raises concerning the proper role of the judge when confronted with a major and divisive question of public policy in the form of a problem of statutory interpretation.

III

The facts of the *Weber* case were largely undisputed:

Kaiser Aluminium & Chemical Corp. opened a plant in Grammercy, La., in 1958. The work force included a number of skilled journeymen in traditional craft classifications. Insofar as the record showed, Kaiser did not discriminate on the grounds of race in hiring, transfers or promotions. Kaiser's practice, however, was to hire for the skilled classifications only persons who already possessed the requisite skills and training. Pervasive racial discrimination by other employers and labour unions barred black persons from access to the skilled crafts. Kaiser's policy of hiring only qualified craftsmen therefore resulted in an over-whelmingly white skilled work force — only five out of 273 craftsmen were black — in a labour market where the labour supply was 39 per cent black.

In the early 1970's the federal government was deeply concerned with remedying alleged violations of Title VII of the Civil Rights

Act of 1964,[10] and also of Executive Order 11246 in the steel and aluminium industries. In 1974 consent decrees covering the basic steel industry were negotiated among the companies, United Steelworkers of America and the federal government, and were entered by U.S. district courts. The decrees provided *inter alia* that vacancies in apprenticeships and entry level jobs leading to the skilled crafts would be filled by bids from lower level jobs at the same plant according to seniority but that there should be two seniority lists, one for black and other minority workers and one for all other employees, and that workers should be promoted alternately from each list so as to increase the proportion of minority craftsmen.

Similar provisions were written into the United Steelworkers' 1974 collective bargaining agreements with the aluminium producers, Alcoa, Reynolds Metals and Kaiser. Fifteen Kaiser plants were covered. The training programme called for promoting one worker from the minority group in each plant for every worker promoted from among the other employees until the proportion of minority employees in the craft positions equalled the proportion in the local labour force.

Brian Weber, a white employee at Kaiser's Grammercy plant, bid to enter the training programme but because of the one-for-one rule his bid was rejected and places were awarded to black bidders with less seniority. Weber then filed a complaint in the U.S. district court charging violation of Title VIII. The district court sustained the complaint.[11] A divided court of appeals affirmed.[12] The U.S. Supreme Court then agreed to review the decision.

Because there was no State action to implicate the equal protection clause of the Fourteenth Amendment, the question was solely one of statutory interpretation: Did Kaiser's training programme which assured black employees 50 per cent of the places in the training programme until the proportion of black craftsmen equalled the proportion of blacks in the local labour market "discriminate against any individual [*i.e.* a white individual] . . . because of such individual's race, color. . . .," in violation of Title VII? The court decided that there was no discrimination by a vote of five to two. Neither the majority opinion nor the dissent discusses the questions of judicial function which the case presents.

IV

The interpretation of a statute should begin, even though it may not end, with the words. Justice Brennan, who delivered the opinion of the court, began by conceding that the Kaiser training programme violated the literal language of the statute. Making much of the majority's concession, Justice Rehnquist argued in dissent that "Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII". In my opinion, Justice Rehnquist claimed, and Justice Brennan conceded, much too much in saying that Kaiser's training programme violated a statutory prohibition which is plain on its face.

Section 703(a) forbids any employer whose business affects interstate commerce —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex or national origin.[13]

Some of the words, when stripped from their context, seem almost as plain as Justice Rehnquist argued and Justice Brennan assumed. The words "to fail or refuse to hire . . . any individual . . . because of such individual's race," standing alone, might well be used spontaneously to forbid any decision based upon race regardless of the ulterior motive. But the words "because of race" could be used, without doing violence to language, to prohibit only such reliance upon race as carries a slur or stigma, or as treats one individual as better or worse than another by reason of race or colour *per se*. The second reading would leave the door open to affirmative action designed to correct disadvantages resulting from previous racial discrimination and isolation.

In choosing between these readings one must consider section 703(a) in its entirety. The word "discriminate" informs the whole. Even though it too permits alternate readings, it usually describes differential treatment that is invidious, hostile or prejudiced.

Professor Socrates might properly say that he exercises a nice sense of discrimination when he grades one examination paper 74 and another 75, but he would also be deeply wounded if he learned of gossip among students that he practised discrimination. Judge Henry Friendly noted the central point in a case turning upon the meaning of "discriminate" in section 8(a)(3) of the National Labour Relations Act:[14]

> Although in common parlance, the word [to discriminate] means to distinguish or differentiate. . . , it more often means both in common and particularly in legal parlance to distinguish or differentiate without sufficient reason.

Much the same verbal dispute had arisen in *Regents of the University of California* v. *Bakke,* where one question was whether very similar language in section 601, of the Civil Rights Act of 1964[15] barred a medical school admissions programme which gave qualified minority applicants preference in filling 16 out of 100 places. Four justices, speaking through Justice Brennan had concluded that the words prohibit only those uses of racial criteria which would violate the equal protection clause of the U.S. Constitution if adopted by a State, and that the words therefore leave room for some race-conscious efforts to extend the benefits of federally-financed programmes to minorities isolated and disadvantaged by earlier societal, racial discrimination.[16] Justice Powell, whose vote was decisive, adopted the same view. Addressing the words of section 601, he emphasized the ambiguity of "discrimination".

> The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible to varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."[17]

Established practice under other parts of Title VII was inconsistent with reading section 703 as an absolutely rigid prohibition against any race-conscious action. Courts regularly redress past racial discrimination in employment by ordering the employer to engage in affirmative action giving members of the minority victimized by the previous unlawful action a measure of preference even though they were not themselves injured by the illegality.[18] In this instance the decrees find support in section 706(g)'s general grant of authority to give equitable relief, but nothing in section 706(g) even hints that a court may appropriately order the employer to take action inconsistent with the alleged-to-be unequivocal and unqualified bar to racial preferences in section 703. Similarly, the federal courts of appeals have quite generally upheld the legality of Executive Order 11246 requiring federal contractors to take affirmative action to recruit and employ racial minorities even in the absence of a determination that the employer had previously engaged in unlawful discrimination.[19] The decisions are nowise inconsistent with Justice Powell's *Bakke* dicta asserting that the legality of affirmative action depends upon "judicial, legislative, or administrative findings of constitutional or statutory violations";[19a] but unless overruled, the cases did show that section 703 could not be read as a sweeping prohibition against any and all affirmative action.

In short, the words of section 703 lacked a plain enough meaning for them alone to control the answer to the question in the *Weber* case.

V

A judge in the United States, given an ambiguous statute, looks next to the record of the legislative debate to discover how the Congress wished to project the general policy of the statute upon the particular occasion.

The debate upon Title VII can hardly be stretched to cover the kind of voluntary affirmative action illustrated by the Kaiser training programme. The relevant speeches and colloquies among Senators and Representatives developed out of the opponents' charge that Title VII would be used by the federal establishment to force employers to meet racial quotas in order to achieve a balanced work force. The proponents vehemently denied the charge. They then went on to assert in sweeping generalities that Title VII did not even *permit* race-conscious preferences. Justice Rehnquist's dissenting opinion collects many such assertions.[20] Their generality was broad enough to cover the *Weber* case. They would be conclusive under the American practice if there were any reason to suppose that the legislators had in mind the particular kind of preference before the court. In fact, the Congressional Record contains not the slightest hint that anyone was thinking about voluntary affirmative action designed to remedy disabilities resulting from previous invidious discrimination. One may doubt the wisdom of placing reliance upon general rhetorical flourishes under the latter circumstances, if the search is truly for legislative intent.

The debates contribute even less support to the opinion of the court. The opponents of Title VII forced the proponents to insert a proviso declaring that nothing in Title VII "shall be interpreted to *require* any employer. . . to grant preferential treatment. . . to any group" because of a racial imbalance in the work force.[21] Justice Brennan reasoned that the failure to use the words "require or *permit*" showed an intent to permit affirmative action.[22] The inference seems unwarranted because the only objection to be answered by proviso was that the bill could be construed to require affirmative action. No one argued in either House that voluntary affirmative action should or should not be permitted.

Efforts to extrapolate an answer from the general policy of Title VII and other portions of the Civil Rights Act of 1964 were even less fruitful. The opinion of the court relies chiefly upon the evidence that the central purpose of Congress in enacting Title VII was to open to Negroes employment opportunities which had traditionally been closed. The difficulty is with the argument that there must be some limit to the thrust of that policy yet there is no evidence to show where the line should be drawn. Justice Rehnquist concluded that the debates "irrefutably" demonstrate "that *no* racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance," because "the spirit of the Act" — he said — "rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is 'equality'."[28]

The word "equality" was endlessly repeated, but it merely carries us back to the original questions: What did "equality" mean to the Senators and Representatives who debated the bill? Did they measure "equality" by legal right or Platonic abstraction? Or did they look to "equality"as a fact and as a result," as President Johnson later proposed? Would they have said prior to the Kaiser training programme that black workers had an "equal" opportunity to become electricians and machinists at Kaiser because anyone who was already a skilled journeyman would be considered regardless of colour? Or would they have said that black men did not have an "equal" opportunity because no black men were, or had ever had a chance to become, skilled journeymen?

The Congressional Record gives no answers to these questions because they had not risen to the level of legislative or national consciousness in 1964. Affirmative action came later, as did the national debate upon affirmative action. To seek the intent of Congress upon so fundamental a question in debates held before the true question was comprehended is to chase the will o'the wisp.

VI

Given the ambiguous words and the unhelpful legislative history, it becomes meaningless, even disingenuous, to speak of legislative intent. How now should the judge set about reaching his decision?

Strict adherence to the view that the legislators must make, while judges can only find, the law would lead to permitting voluntary affirmative action such as Kaiser's upon the ground that no legislative prohibition has been proven. If violation of Title VII were a crime, strict construction might prevail today; but on the civil side there is too much statutory and administrative regulation and legislatures have created too many private rights and remedies for the interpretation of statutes any longer to be biased against legislative intervention. Similarly, in the United States at least, the old maxim that judges merely apply law made by the legislators has become at most an admonition to give effect to whatever legislative mandate is reasonably discernible. Our judges have built great bodies of law upon bare statutory foundations. Anti-monopoly law is one example. Labour management relations law is another.

Pursuing these trends, the candid open-minded judges facing the problem of statutory interpretation in the *Weber* case might well suppose it his duty to decide, as if he were a legislator free from political pressures in his constituency, whether the affirmative action taken by Kaiser and Steelworkers ought to be permitted or forbidden by the law. Unless the judge deemed all affirmative action socially undesirable, he and other judges would have to rule upon the merits and demerits of various plans, thus building a body of law.

If this is to be the judge's role, might the task not be better done explicitly, with the briefs and arguments of counsel, and later the opinion, directed to the question of policy? Veiling the true judicial process in denials of verbal ambiguity and appeals to indecisive legislative history risks decisions based upon ill-considered preconceptions that might evaporate upon a more candid effort to reason the policy out.

In affirmative action cases a broader tradition is available, upon which decision could be based.

Those who won the American colonies freedom from British rule linked the claim to individual liberty with a strong sense of responsibility not only for oneself — for one's own exercise of the power of choice between good and evil — but also for the progress of the human enterprise. "I must study politics and war," John Adams wrote, "that my sons may have liberty to study mathematics and philosophy, geography, natural history and naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statutary, tapestry, and porcelain."[24] Ultimately, the sense of social responsibility must be individual, but individuals acting together through corporations, organizations and other institutions may continue to feel and act upon an obligation to persuade their enterprises to take what action they can to solve social problems and promote equality and justice. The sense of personal obligation to contribute to the progress of the whole enterprise has grown weaker, but it is far from dead and the future of freedom may well depend upon restoring the vigour of that spirit.

In particular, the goals of human dignity and equality of opportunity cannot be won for the victims of caste or racial prejudice exclusively through law and government. There is need for individual and other organized and institutional action to realize those human aspirations.

Under this philosophy, when the words leave room for choice, the equal protection clause and any general statutory prohibition against discrimination because of race or colour should be interpreted to encourage voluntary action designed to contribute to the social enterprise. Putting the law aside, Kaiser and Steelworkers would seem to have exercised a very considerable sense of social responsibility. In the situation presented by the *Bakke* case, colleges and universities would seem to have been acting responsibly in adopting various private initiatives in an effort to solve problems resulting from the isolation of ethnic groups long subjected to systematic racial discrimination. Possibly all were misguided. There are dangers in permitting employers and other organizations to take race-conscious action, even in favour of minorities. There are also dangers in omitting remedial action. Given these conditions and the absence of a clear-cut statutory or constitutional mandate, the wisest judicial course would seem to be to construe both statute and Constitution to respect the individual's freedom and moral responsibility to choose how best to contribute to the social enterprise.

So widely accepted an inherited tradition offers a firmer foundation for judicial decision than either resolution of the merits of the political question.

REFERENCES

1. (1979) 443 U.S. 193.
2. (1954) 347 U.S. 483.
3. U.S. Const., Amend. XIV provides in relevant part —
   > No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
4. *Pub. L.* 88-352, (1964) 78 Stat. 243.
5. See, *e.g.*, Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303, 34 Fed. Reg. 12985; Executive Order 11625, (1971) 36 Fed. Reg. 19967.
6. See, *e.g.*, Small Business Act, 15 U.S.C. §637, as implemented by 13 C.F.R. 124.8(c)(1) (1976); Railroad Revitalization Act, 45 U.S.C. §1657a; Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2). The constitutionality of the last-cited set aside for minority owned businesses was upheld in *Fullilove* v. *Klutznick*, (1980) 100 S.Ct. 2758.
7. The admissions policy of Harvard University is described in an appendix to the opinion of Justice Powell in ***Regents of the University of California*** v. *Bakke*, (1978) 438 U.S. 265.
8. Aristotle, *Nichomachean Ethics* (bk. X, ch. 8).
9. *Supra* note 1.
10. Section 703(a), 42 U.S.C. §2000e-2(a).
11. (1976) 415 F. Supp. 761.
12. (1977) 563 F. 2d 216.
13. 42 U.S.C. §2000e-2(a).
14. *NLRB* v. *Miranda Fuel Co.*, (2d Cir. 1963) 326 F. 2d 172, 181.

15. 42 U.S.C. §2000d —

> No person in the United States shall, on the ground of race, colour, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity receiving Federal financial assistance.

16. *Supra* note 7 at 328-355.

17. *Id.* at 284.

18. See, *e.g., Patterson* v. *American Tobacco Co.*, (4th Cir. 1976) 535 F.2d 257, 273-74; cert. denied. (1976) 429 U.S. 920, and cases cited therein.

19. See, e.g., *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor* (3d Cir. 1971), 442 F.2d 159 cert. denied, (1971) 404 U.S. 854; *Southern Illinois Builders Ass'n* v. *Ogilvie*, (7th Cir. 1972) 471 F.2d 680; *Joyce* v. *McCrane*, (D.N.J. 1970) 320 F.Supp. 1284; *Weiner* v. *Cuyahoga Community College District*, 19 Ohio St. 2d 35, 48 Ohio Ops. 2d 48, 249 N.E. 2d 907, cert. denied, (1970) 396 U.S. 1004. See also *Associated General Contractors of Massachusetts* v. *Altshuler*, (1st Cir. 1973) 409 F.2d 9, cert. denied, (1974) 416 U.S. 957.

19a. *Supra* note 7 at 307. Other parts of the opinion seem inconsistent with these statement.

20. *Supra* note 1 at 236-243.

21. 42 U.S.C. §2000e-2(j).

22. *Supra* note 1 at 205-207.

23. *Id.* at 254.

24. Charles F. Adams, ed., *Letters of John Adams to his Wife*, (1848) vol. II, letter 78.

9

THE JUDGE AND INDUSTRIAL DISPUTES

J. A. G. GRIFFITHS

In this paper I propose to discuss three important decisions in the field of industrial relations and then comment on the light they throw on the attitude of the senior judiciary in Britain today towards such controversial and political matters.

The first case *NWL* v. *Woods*[1] reflects the longstanding and continuing dispute about rates of pay among seamen. In August 1978 a ship which had previously flown the Norwegian flag and had a Norwegian crew who had received what [was described as] "high rates of pay", passed into the ownership of a company which had been formed in Hong Kong, the beneficial ownership of whose shares were Swedish. The ship's port of registry was changed from Oslo to Hong Kong, her flag was changed to British and she was re-named the *Nawala*. She was managed by a New York organisation and a new crew, recruited in Hong Kong at wages that were "very low by European standards", was flown to Europe to man her. Most of the new crew were not members of a trade union.

The International Transport Workers Federation (ITF) had a policy of blacking ships registered under flags of convenience so as to try to force shipowners to agree to ITF terms and conditions of employment. In June 1979 an ITF representative told the *Nawala's* agent that if she entered the British port she would be blacked unless the ITF conditions were complied with.

Section 13 of the Trade Union and Labour Relations Act 1974 provides, repeating the long-established wording designed to protect trade unions from suit in certain circumstances :

> (1) An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only — (a) that it induces another person to break a contract or interferes or induces any other person to interfere

> with its performance; or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.

The owners claimed an injunction against the ITF representatives restraining any interference with the free passage and operation of the *Nawala*. The judge at first instance (Donaldson J.) and the Court of Appeal and the House of Lords all refused to issue the injunction.

In the House of Lords, Lord Diplock, having explained how and for what purpose the ITF endeavoured in such cases to exert what he called its "industrial muscle" said that the Law Lords were "in no way concerned with the economic wisdom or the moral justification" of this policy which, he said, "does not command the approbation of seamen and their national trade unions in those countries of Asia which have traditionally formed the recruiting grounds for many thousands of seamen eager to serve under articles that provide wages which, although lower than those demanded by their European, North American and Australasian counterparts, are, nevertheless, much higher than anything they could hope to earn in land-based work in their own countries".

The question was, said Lord Diplock, whether the defendants have shown upon the evidence a likelihood of establishing that what they did or threatened to do was done or threatened in contemplation or furtherance of a trade dispute, as would justify the court in exercising its discretion in favour of refusing the injunction sought?

The plaintiffs argued, on the basis of an earlier decision of the Court of Appeal,[2] that a dispute as to a flag of convenience in furtherance of ITF's policy was a political and not a trade dispute. Lord Diplock rejected this saying: "It would be carrying judicial anchoritism too far if this House were to feign ignorance of the fact that, apart from fiscal advantages, one of the main commercial attractions of registering vessels under flags of convenience is that it facilitates the use of cheap labour to man them. So even the ultimate object of ITF's campaign is connected with the terms and conditions of employment of seamen" and so a trade dispute as defined in the Act. But Lord Denning in the Court of Appeal in *The Camilla M* took the view that as what the ITF persisted in demanding was virtually impossible of performance by the owners it could be inferred that the ITF was acting "for some extraneous motive and not for any legitimate trade object", and so the acts were not done in furtherance of a trade dispute. An example of such an act was *British Broadcasting Corporation* v. *Hearn*,[3] where union officials threatened that their members would refuse to allow the BBC to televise the football cup final in such a way that it could be seen by viewers in South Africa.

Lord Diplock emphasised that if a dispute was pursued with more than one object in mind and the predominant object was not the improvement of terms and conditions of employment, nevertheless the dispute might be in furtherance of a trade dispute. "Even if", he said, "the predominant object were to bring down the fabric of the present economic system by raising wages to unrealistic levels" this would still be a trade dispute if the actual demand was about terms and conditions of employment. In his view *The Camilla M* should be treated as overruled. Lord Diplock concluded by answering his own question: "The defendants have a virtual certainty of establishing their defence of statutory immunity". Lord Fisher and Lord Scarman, in shorter speeches, agreed with Lord Diplock.

My second case is *Express Newspapers* v. *McShane*.[4] Here we must distinguish more clearly the views of the Court of Appeal and of the House of Lords. A dispute over pay arose between the proprietors of local newspapers and journalists employed by them, most of whom were members of the National Union of Journalists (NUJ). The union called a strike withdrawing services of all NUJ journalists on local newspapers. Those newspapers received news copy from the Press Association (PA) in London. To make the strike more effective the NUJ called out the journalists at the PA, an action which would affect national newspapers. The NUJ also called on its members on national newspapers to refuse to use copy from PA. The plaintiffs, a national newspaper, obtained from the judge at first instance an injunction restraining the defendant members of the NUJ from procuring any of the NUJ members employed by the plaintiffs from breaking their contracts of employment by refusing to handle PA material.

In the Court of Appeal, which upheld the judge, Lord Denning M. R. asked whether the blacking of copy supplied by the PA could be an act "in furtherance of" the dispute between the local newspapers and the local journalists. It was said on behalf of the defendant journalists that "furtherance" depended on their state of mind: if they genuinely and honestly believed that the blacking would advance the cause of the local journalists, their acts were "in furtherance". The judge at first instance did not accept that submission. Nor did Lord Denning who said furtherance was not "a merely subjective concept". There was also an objective element. "It seems to me" said Lord Denning, "that, for an act to be done "in furtherance of" a trade dispute, it must be reasonably capable of doing so, or have a reasonable prospect of it, in this say that it must help one side or the other to the dispute in a *practical* way by giving support to the one or bringing pressure to bear on the other". Lord Denning said that the blacking of PA copy had no practical effects. So it was not "in furtherance". Lawton and Brandon LL.JJ. agreed in the result with the Master of the Rolls.

In the House of Lords, Lord Wilberforce considered at some length the arguments for the subjective test and for the objective test. He thought Lord Denning went too far in settling on "practical effect" as the objective test for this involved judging the matter by results, "a very uncertain process in the complex, and sometimes irrational world of industrial relations". Lord Wilberforce preferred the view of Lawton and Brandon LL.JJ. which he interpreted as being that the acts done, pursuant to the genuine intention, must be reasonably capable of achieving the objective but it was not necessary to prove that what was done would achieve the objective. However, having accepted that formulation, which has an objective element in it, Lord Wilberforce concluded in favour of the NUJ.

Three other Law Lords — Diplock, Keith and Scarman — agreed with Lord Wilberforce in the result but they were prepared to say simply that the test was subjective. Lord Salmon used the formula "honestly and reasonably" which puts him somewhere between those three and Lord Wilberforce.

Thus, Lord Diplock said that at the root of the judgments of the Court of Appeal appeared to lie an assumption that Parliament could not really have intended to give so wide an immunity from the common law of tort as the words of the statute appeared to grant to everyone who engaged in industrial action. But this was not "a legitimate assumption . . . notwithstanding that the training and traditions of anyone whose life has been spent in the practice of the law and the administration of justice in the courts must make such an assumption instinctively attractive to him". So, "if the party who does the act honestly thinks at the time he does it that it may help one of the parties to the trade dispute to achieve their objectives and does it for that reason, he is protected by the section".

Lord Scarman, agreeing, confessed that he was relieved to find that this was the law. "It would be a strange and embarrassing task for a judge to be called upon to review the tactics of a party to a trade dispute and to determine whether in the view of the court the tactic employed was likely to further, or advance, that party's side of the dispute . . . It would need very clear statutory language to persuade me that Parliament intended to allow the courts to act as some sort of backseat driver in trade disputes".

So the decision of the Court of Appeal was reversed.

The third case is *Duport Steels Ltd.* v. *Sirs.*[5] Here the original dispute was between a trade union, the Iron and Steel Trades Confederation (ISTC), and a nationalised industry, the British Steel

Corporation (BSC). BSC ran the public sector of the steel industry, producing 50 per cent of the steel in the United Kingdom. The dispute was over pay and the BSC said they could not increase their offer to the workforce unless that increase was directly funded by the Government. In order to bring pressure to bear on the Government, the ISTC decided to extend their industrial action, a strike, to the private sector where the workers were not in dispute with their private employers. Faced with this extension 16 private steel companies sought injunctions against the officials of ISTC to restrain them from inducing breaches of contract or inducing members to interfere with the supply of steel or to picket. The ISTC claimed that the extension of the strike was action taken in furtherance of a trade dispute under section 13(1) set out above. The private companies claimed that the action was not protected by the section unless it was intended to have an immediate adverse trade or industrial effect on the other party to the original dispute, that is on the BSC and that the action would not have that effect.

At first instance, the judge refused the application for the injunctions. But the Court of Appeal granted it.

Lord Denning M. R. was clearly concerned at what he saw to be the possible effects of the strike. He said: "We will lose trade here in this country, and our competitors abroad will clap their hands in anticipation of being able to send their products into England because our industry is at a standstill". Lord Denning suggested that there were now two disputes and one of them, that between the union and the government, was not a trade dispute; that there was also the question of whether the acts complained of were not too remote from the trade dispute; and that there was "a residual discretion in the courts to grant an injunction restraining such action as in this case, where it is such as to cause grave danger to the economy and the life of the country, and puts the whole nation and its welfare at risk". In these circumstances, he said, the courts could grant an interlocutory injunction unless it was clear, or in the highest degree probable, that there was a defence which was likely to succeed. Lawton and Ackner LL.JJ. agreed.

The defendants appealed to the House of Lords which unanimously — Lords Diplock, Edmund-Davies, Fraser, Keith and Scarman — allowed the appeal.

Lord Diplock referred to the decision of the House only a few weeks before in *Express Newspapers* v. *McShane.*[6] Not that he liked the decision which he and other Law Lords had come to in that case. Indeed that conclusion about the subjectivity of the test of intention was "intrinsically repugnant to anyone who has spent his life in the practice of the law or the administration of justice". But, he said, "the role of the judiciary is confined to ascertaining from the words that Parliament as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambuguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral". Even more strongly, he continued: "It endangers public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest".

It appeared from Lord Diplock's speech that "the two disputes" arguments on which the Court of Appeal in part based itself had not been advanced by counsel but originated from a suggestion proferred from the bench during the hearing in the Court of Appeal. Before the House of Lords, counsel did not seek to uphold the judgment of the Court of Appeal on that ground.

The other speech of particular note was that of Lord Scarman. Speaking of the creative function of judges he distinguished the common law and equity where, "subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law". But when considering statute law "the judge must be obedient to the will of Parliament . . . Our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment . . . For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right . . . confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges".

* * *

Professor Lord Wedderburn[7] traced the development of the relationship between trade unions and the courts in western Europe. He noted that the problem of the illegality of trade unions derived from the systems of law based on rights of property in the 18th and 19th centuries. When workers began to seek to combine, as the industrialisation of societies proceeded, the first stage in the different countries was of the same repressive character. The criminal law was used and then gradually abandoned so as to permit workers to set up associations. Later, in most European countries, but not in Britain, workers acquired positive rights — to associate, to organise and to strike. In Britain, matters developed differently. From 1875 trade unions were protected from criminal liability for acts done "in contemplation or furtherance of a trade dispute" and this was extended to certain aspects of the civil law in 1906, partly in terms similar to those quoted above as section 13 of the Act of 1974.

It was this process which enabled some judges and many others to claim that trade unions in Britain were protected by "immunities" and "privileges" granted in limited terms by statutes. Judicial interpretation of those terms often proceeds from this premise that trade unionists have no rights. Lord Wedderburn attributes this difference in Britain, when contrasted with other European countries, to the fact that in Britain during the second half of the 19th century the labour movement was wholly industrial with no political organisation — the Labour party did not come into existence until 1906. During that period, it is interesting to note that it was the politicians who generally sought ways of enabling the trade union movement to operate, while it was the judges who sought, in their interpretation of the legislation, to restrict trade union activity within narrow limits.

From 1906 until the 1960s, conflicts between trade unions and the courts were infrequent. In the period between the wars, especially after the collapse of the strikes in 1926, trade unions were weak as they usually are during periods of economic recession. In the 1960s, cases on picketing began to reach the courts. In *Tynan* v. *Balmer*,[8] for example, forty pickets in a continuous circle around a factory were held not to be legalised by the Act of 1906 and their action was a nuisance at common law and an unreasonable use of the highway. In 1972 a strike picket held a placard in front of a vehicle on a highway, urging the driver not to work at a nearby site and preventing him from proceeding along the highway. Although the whole incident lasted for not more than nine minutes the House of Lords upheld the conviction for obstruction of the highway.[9] In *Kavanagh* v. *Hiscock*[10] a police cordon prevented pickets from approaching a coach carrying workers out of a site and the defendant became involved in a scuffle with a policeman and was convicted for obstructing him in the execution of his duty. The definition of what was reasonable picketing appeared to trade unionists to be narrowed by these decisions.

Earlier, in *Rookes* v. *Barnard*[11] the House of Lords held that a threat to strike could be an unlawful conspiracy. In a series of cases of which *Stratford* v. *Lindley*[12] and *Torquay Hotel* v. *Cousins*[13] were the best examples, the courts limited the protection given to trade unions from liability for inducing breach of contract.

But the early 1970s proved to be in sharp contrast to the early 1870s. The Industrial Relations Act of 1971 passed by a Conservative Government sought to control the activities of trade unions by law, and therefore by use of the courts and the judges, in ways which were contrary to the tradition of industrial relations in Britain. The administration of the Act greatly exacerbated the feelings between the judiciary and the trade unions and the National Industrial Relations Court set up under the Act was, says Lord Wedderburn, "naturally perceived by the unions as an instrument of class justice".

In the late 1970s the Court of Appeal, led by Lord Denning M. R., began to develop doctrines which would have greatly limited the protection afforded by the words "in contemplation or furtherance of a trade dispute". The *Camilla M* has been discussed above. And it should be noted that of the three cases discussed at length in the first part of this article on the one occasion when the Court of Appeal was upheld by the House of Lords,[14] Lord Denning M. R. did not participate, the Court of Appeal consisting of Lord Salmon and Stephenson J.

In *Beaverbrook Newspapers* v. *Keys*,[15] the circulation of the plaintiff's newspaper increased considerably when production of the *Daily Mirror* was stopped for a time by a dispute between the management and journalists. The defendant, the general secretary of one of a trade union whose members handled and distributed the newspapers instructed union members employed by the plaintiffs not to handle copies of their paper in excess of normal production. The Court of Appeal held that the defendant's act was not directly "in furtherance" of the dispute and allowed the appeal. Lord Denning M. R. said that the defendant's act was "far too remote" from the only dispute recognised by the Court of Appeal, that between the *Daily Mirror* and its journalists.

In *Associated Newspapers Group* v. *Wade*,[16] the trade union, with the object of achieving eventual recognition by a local newspaper as the body to be negotiated with, sent letters to advertisers asking them to stop advertising in the newspaper and warning that if they did not do so their advertisements in other newspapers would be blacked. Subsequently 16 named advertisers suffered in this way. The Court of Appeal found against the union, Lord Denning M. R. again stressing the remoteness of their action from the trade dispute itself.

What the House of Lords did in the three cases I have discussed in the first part of this article was to stop the Court of Appeal from developing these doctrines.

It must first be emphasised how blatant was the challenge thrown down by the Court of Appeal in its decision in *Duport Steels Ltd.* v. *Sirs*.[17] It is difficult to believe that the Court of Appeal could have thought it was not bound by the decision of the House of Lords, overruling the Court of Appeal, in *Express Newspapers* v. *McShane*.[18] And the House in *Duport* made clear that it thought the Court of Appeal had been searching around for some way in which it could somehow arrive at the conclusion it wished. This approach of the Court of Appeal was inspired by its dislike of the activities of trade unionists and was far removed from Lord Scarman's expressed thankfulness that in his opinion Parliament had not intended that he should seek to direct the course of industrial relations from a position far removed from the levers of power.

Secondly, it must be remembered that the proceedings in these cases were for interlocutory injunctions. In other words they were in theory pre-trial proceedings — hence the emphasis, following the leading of *American Cyanamid* v. *Ethicon Ltd.*[19] on the likelihood of the defence being or not being successful in future proceedings. This, however, is unrealistic because the interlocutory proceedings are very rarely, in these cases, followed by substantive proceedings because by the time they come to a hearing the industrial situation will have been overtaken by events.

In recent years, not only because of the involvement of the judiciary in cases of industrial relations, judges in Britain have been exposed to public criticism far more than in the past. Unfortunately, with some exceptions of whom Lord Scarman is the most notable, the response of judges to this criticism has been insensitive. One particularly unproductive type of reaction has been that adopted by the present Lord Chancellor Hailsham, with others, which is to argue that criticism of judges is dangerous because it undermines the confidence which the public should have in the judiciary. This seems to disregard the possibility that the criticism has arisen precisely because that confidence has already been undermined. That undermining was certainly made deeper by the extent to which the judiciary were forced into the industrial relations disputes in the early 1970s although there were many other areas of judicial activity concerning, for example, police powers, immigrants, students, race relations, and conspiracy which had given rise to concern. All this is part of a larger picture which would show how we in Britain have for twenty years or so been living through a period of greatly increased judicial interventionism.

The three cases I have discussed at some length mark a change in judicial attitudes at the highest level. I am not sure that I agree with Lord Wedderburn when he speaks of *Express Newspapers* and *NWL* v. *Woods* in the House of Lords as constituting "the most important judicial event of the century in the law concerning trade disputes."[20] It may well be that the Law Lords were determined to stop the further drift towards political involvement which the general philosophy of Lord Denning seemed to favour.

The tension in Britain between the judicial and the political is as old as the Constitution. Nor is it unhealthy. But the strain can easily become too great and had the House of Lords followed Lord

Denning and his supporters in the Court of Appeal down the road they wished to travel, there might well have been a multiple fracture. Meanwhile the politicians are active again. The Conservative Government in its Employment Act 1980 is attempting to regulate certain trade union practices concerning "secondary" industrial action. One view is that Lord Diplock (in particular) expressed his political opinions of the economic dangers of strike action in forceful terms in *Duport Steels* so as to encourage the Government to introduce equally forceful legislation. But it may be doubted whether the Government needed more encouragement than it was already receiving (and which it was to some extent resisting).

Whether these decisions mark a great and lasting easing of the tension between the senior judiciary and the trade unions remains to be seen. My own view is that nothing will be known until the first cases begin to be decided under the new legislation. Then, I suspect, the judges now more firmly based on the new statutory provision will prove as eager as in the recent past so to interpret the law as to influence trade union activity towards the adoption of their own conception of the public interest. And that is a conception which is not likely to be shared by the trade unionists themselves.

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7. See Lord Wedderburn (1980) *Industrial Law Journal* (June).
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16. [1979] I.C.R. 664.
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19. [1975] A.C. 396.
20. See, (1980) *Modern Law Review* at 319.

10

APPELLATE DECISION MAKING IN THE COMMON LAW WORLD

ALAN PATERSON

It is a truth commonly neglected by scholars, that judicial decision making in the higher appellate courts in the Anglo-American world is typically a collective enterprise — a group activity rather than a multiplicity of individual efforts. The size and content of the 'group' varies from court to court. Usually, it includes the counsel or the brief-writers as well as the sitting judges; sometimes, it extends to other judges or to law clerks; very occasionally, it includes legal academics or other 'outsiders'. Again, the form and nature of the exchanges between 'group-members' varies between courts. Thus, in the U.S. Supreme Court the bulk of the interchanges in the decision making process, whether between counsel and the Bench, justice and law clerk or justice and justice, are in writing. In the House of Lords and the Privy Council they are mainly oral. Insignificant as such variations may seem, they entail that the role of the appellate judge in the Anglo-American world is far from homogeneous.

While in the United States oral advocacy in the highest appellate tribunals is being increasingly curtailed,[1] in the United Kingdom even the pressure of spiralling inflation in legal costs has not produced a similar trend. In the House of Lords counsel and law lord alike consider that a predominantly oral approach, with the consequent flexibility which it gives to the arguments, has advantages which cannot be matched in a written brief.[2] Counsel can, and are expected to, respond to the thoughts expressed by the court and to adjust their arguments accordingly. Lord Reid told me,

> [Counsel] have got to know their stuff and know it backwards and they have got to be a little bit, taking a hint, you know. A

> man who simply reads out his stuff from his notes and will not take a hint is not a good advocate.

Thus, a case can change course in mid-stream as a result of a point thrown up in the debate. As another law lord remarked,

> I have known cases in which when the case started I was convinced that the appellant was either right or wrong and during the course of the case a point made either by me or by one of my colleagues has completely changed one's view.

Moreover, oral argumentation, at least in the House of Lords and the Privy Council (as I have argued elsewhere),[3] both restricts the range of judicial creativity and exercises a persuasive influence on the decision ultimately reached, in a way that written briefs, at least in the U.S. Supreme Court, do not. As Lord Scarman recently observed:[4]

> The judge, however wise, creative, and imaginative he may be, is 'cabin'd, cribb'd, confined, bound in' not, as was Macbeth, to his 'saucy doubts and fears' but by the evidence and arguments of the litigants. It is this limitation, inherent in the forensic process, which sets bounds to the scope of judicial law reform.

Gillis Wetter in *The Styles of Appellate Judicial Opinions* concludes from this limitation that,[5]

> . . . the most notable effect of a court considering the primary function of its opinions to be the rendering of conclusive answers to the allegations of counsel . . . is that of shifting the responsibility for judicial law-making from the courts to the Bar . . . .

I think that Wetter is overstating his case, for the interchange between Bench and Bar is not all one way. It is a dialectic to which each side contributes. Each may borrow from the other. Nevertheless, it is clear that counsel's part in the decision making process in the House of Lords is a significant one even though it has been overlooked in much of the recent jurisprudential writing on judicial creativity.[6] A scrutiny of *The Brethren,*[7] of judicial diaries[8] and other research,[9] however, reveals that in the U.S. Supreme Court, despite occasional flattering references to counsel's arguments by justices, the oral and written arguments of counsel contribute considerably less to the decision making process than is the case in the United Kingdom. This is in part due to the inflexibility of written briefs, in part to the lack of a specialist Supreme

Court Bar and in part to the fact that justices may (if they so desire) use their law clerks to assist them in researching the relevant law.

The emphasis on oral argumentation which persists in U.K. appellate courts also influences the interaction between the core members of the decision making 'group', *i.e.*, the judges sitting in the case. The fact that oral argumentation in the House of Lords and the English Court of Appeal may last for days but that in the U.S. Supreme Court it is usually limited to an hour per case, means that in most English appeals the bulk of the formative exchanges between the judges take place during the period when the arguments are being heard. In the highest appellate tribunals in the United States, on the other hand, almost all of the judicial exchanges in the decision making process take place after the briefs have been read and the oral argument (if any), heard.

On both sides of the Atlantic appellate judges interact even as the oral argument — is being made — either in whispered asides or by interventions ostensibly aimed at counsel though in reality directed at their colleagues. But in the U.K. courts this is only part of a continuing process. In the Court of Appeal where the pressure of work is intense and 95 per cent of judgments are unreserved, the tentative exchanges of views between the members of the court in adjournments is all too often hasty and incomplete. In turn, this means that, typically, decision making in the Court of Appeal is not so much a group activity as a number of solo performances. Sir Charles Russell's account of the production of unreserved judgements in the court, clearly reveals the drawbacks in this.[10]

> Toad, L.J. leads off. Slug, L.J. as the junior has decided to say nothing of his own. Frog, L.J. has decided to say a little piece of his own. Consider the situation of Frog, L.J. who prefers to jot down his thoughts. With his right hand and most of his brain he is doing this. With his left ear and the rest of his brain he is at the same time trying to follow what Toad, L.J. is saying — not really an easy exercise. All too often Frog, L.J. is rash enough to start his judgment with the words "I agree". Really he means by this that he agrees with the order proposed and that he has not been able to detect in what he has grasped of the judgment of Toad, L.J. any errors, or any error that he is able at such short notice to denounce as such or refute. But what happens? Other lawyers — and I do not confine them to the writers of text books or articles or the teachers of youth — pick upon those two introductory words and claim for some proposition the weighty authority of not only Toad, L.J. but also Frog, L.J. Whereas in truth Toad, L.J. had a brilliant notion half way through a sentence, a notion that he much later rather

> regretted, and Frog, L.J. never heard the notion, or having heard assumed that he had misheard or was unwilling to produce an undigested disclaimer. . . . And what of Slug, L.J. who had decided to say nothing original? He was as a result able to listen to everything that was said by the other two. But suppose that he heard from them or one of them something with which he was not altogether happy? Poor Slug is in rather a fix. Is he to recite his objections, which anyway he finds it difficult to formulate at short notice, and add "otherwise I agree"? Or suppose he prefers the way in which Frog, L.J. has put it to that of Toad, L.J.? Does he say that for the reasons given by Frog, L.J. he agrees with the order proposed by Toad, L.J.? . . . In the end Slug, L.J. contents himself with saying tersely "I agree" — though he may, frequently with every justification, continue "and there is nothing I can usefully add", an addendum that denies its own function.

In the House of Lords or the Privy Council, however, there are constant discussions between the judges outside the committee rooms — at lunch, at the end of the day's hearing, in each other's rooms and in the mornings before the hearing resumes. Once the hearing comes to an end a formal conference is held. Thereafter, the presiding judge (in the Privy Council) assigns who is to write the opinion of the court. In the House of Lords it is sometimes collectively agreed that a law lord will write the leading opinion but more often than not it is still unclear at the end of the conference who will write an opinion.

The law lords are divided as to the merits of the Privy Council practice of having a single majority judgment. One retired law lord commented:

> The people who were accustomed to being in the Privy Council got rather good at rendering one judgement that reflected that opinions of the others. There was a sort of tradition that you didn't take a strong line unless it was one which could be shared by the others.

Other law lords were less enthusiastic. As one put it,

> We all know that in the Privy Council it gave quite a bit of weakness over the centuries to a Privy Council judgement that sentences were put in for the man who thought the appeal was doubtful as to whether it should succeed, and felt that it was more likely it should fail, as against the man who wrote it, who was certain it should succeed, and so he would put in the sentences. . . . You are getting a compromise judgement in a sense.

Composite judgements of this sort are much rarer in the House of Lords, though there are some famous, not to say notorious, examples. As a result, the 'bargaining' over the content of the opinion of the court which is so prevalent in the U.S. Supreme Court[11] is much less common in the House of Lords.

Yet, curiously, there are probably as many private discussions between individual law lords concerning an appeal as take place between justices in the U.S. Supreme Court. This is largely due to two institutional factors. First, the justices have their own chambers with several law clerks, secretaries and a messenger. Each functions as a small, independent law firm. The justice relies on his law clerks for discussion in a case and collaborates with them while drafting his opinion.[12] Thus he has less need to confer with his colleagues on difficult points than his trans-atlantic counter-part. Justice Powell has even gone so far as to assert that:[13]

> The [Supreme] Court . . . is perhaps one of the last citadels of jealously preserved individualism . . . The informal interchange between chambers is minimal, with most exchanges of views being by correspondence or memoranda. Indeed, a justice may go through an entire term without being once in the chambers of all of the other eight members of the Court.

Secondly, while the justices frequently write comments on, or memoranda in response to, a colleague's circulated opinion, in the House of Lords this is practically never done. Either the law lord will comment orally to his colleagues on the opinion or he will simply adjust his speech to take account of the points made in the circulated opinion. As one law lord put it:

> At the stage where the opinions are circulated one's colleagues are very polite. If there is an obvious omission you draw attention to it, but you would seldom re-argue the merits.

Another commented:

> Generally you'd leave it alone unless it was a case where you'd agreed that only one judgement would be delivered or if you were going to follow a particular man you might go to him and say, 'Look I'm really almost in entire agreement with you so I just propose to say, "I agree" but I'am a bit stuck about this [phrase] . . .' You might do that.

Of course, some judges participate in the exchanges which I have been describing, with greater effectiveness than others. Small group analysis of the U.S. Supreme Court has shown[14] that both 'social leaders' (judges who endeavour to reduce tensions and to reconcile differences amongst their brethren) and 'task leaders' (judges who use their personality, intelligence, technical competence, esteem within the court and persuasive ability to lead their brethren to a particular outcome in an appeal) exist on the court. They are also to be found in the House of Lords and the Privy Council. The acid test for the 'group-orientated' law lord, however, is not how often he influences his colleagues. Some law lords have found to their cost that, if they 'lobby' their colleagues too persistently (particularly if they are not open to persuasion in return), they are very likely to have a negative influence on their colleagues. The acid test is whether he can influence a majority of his colleagues to share his point of view, particularly where this will result in a voting switch or even a reversal of the existing majority position. Such successes do occur but are remarkably hard to document. The final judgment cannot be taken at face value. A unanimous decision may eventuate from a court divided at the first conference. Equally, there have been 3 : 2 decisions where none of the participants have ever felt any doubt. My researches revealed that in the House of Lords most changes of mind take place at the hearing stage, but that they also occur between the first conference and the final judgement. In the U.S. Supreme Court, perhaps because of the pervasiveness of 'bargaining', justices frequently change their positions after the initial conference.[15] Nevertheless, it is very difficult to establish that such changes in the House of Lords are the outcome of effective lobbying by 'group-orientated' law lords. What I can say is that the law lords with such an orientation have usually ended up on the majority side in cases in the past twenty years where the House has been heavily divided.

In sum, appellate decision making in the common law world is typically a collective process, and, as Sir Charles Russell's account of the Court of Appeal suggests, this is not necessarily an undesirable feature. However, there are considerable variations in the process because some judges are more 'group-orientated' than others and because the internal procedures of each court are different. The conclusion that appellate decision making is a collective activity has a number of implications for students of the judicial process, but two will suffice here. First, the role of counsel in the decision making process should be given its proper recognition. Secondly, the traditional measure of success in an appellate judge *i.e.*, the long term standing of his judgments, should be revised. A judge who exercises 'task' or 'social' leadership in his court, may appear very little in the *Law Reports*, though profoundly influencing the outcome of the cases in which he sat.

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3. See ch. 3 of *The Law Lords.*
4. *Lim Poh Choo* v. *Camden and Islington Area Health Authority,* [1980] A.C. 174 at 183 C-D.
5. (1960) at 72.
6. One notable exception is Neil MacCormick's *Legal Reasoning and Legal Theory* (1978).
7. B. Woodward and S. Armstrong, *The Brethren* (1979).
8. *E.g.*, J. Lash, *From the Diaries of Felix Franfurter* (1975) and M. F. Berry, *Stability, Security and Continuity* (1978) (based on Justice Burton's diaries).
9. *E.g.*, R. Kluger, *Simple Justice* (1977); H. J. Abraham, *The Judicial Process* (4th Edn.) (1980); T. B. Marvell, *Appellate Courts and Lawyers* (1978); S. Ulmer, 'Earl Warren and the Brown Decision' (1971) 33 *Journal of Politics* 689.
10. See 'Behind the Appellate Curtain' Presidential Address by Russell L.J. (1969) at 6-7.
11. See *e.g.*, *The Brethren, supra* note 7; W. Murphy, *Elements of Judicial Strategy* (1964); J. Howard, 'On the Fluidity of Judicial Choice' (1968) 52 *American Political Science Review* 43; S. Goldman and T. P. Jahnige, *The Federal Courts as a Political System* (2nd Edn.) (1976); and Abraham, *The Judicial Process, supra* note 9.
12. This varies with the particular Justice as numerous notes and memoranda published by ex-law clerks have shown. See on law clerks generally, Abraham, *The Judicial Process*, 254-59. *The Brethren* (because of the bias in its sources) exaggerates the importance of the law clerks as intermediaries in the court.
13. 'What the Justices are saying', (1976) 62 *A.B.A.J.* 1454.
14. See *e.g.*, D. Danelski, 'The Influence of the Chief Justice in the Decisional Process' in R. Wolfinger (ed.), *Readings in American Political Behaviour* (1966); S. Ulmer, 'Courts as Small and Not so Small Groups' (Monograph) (1971); Goldman and Jahnige, *supra* note 11 at 178-92, and the references cited therein.
15. See *e.g.*, Berry, *Stability, Security and Continuity, supra* note 8; Howard, 'On the Fluidity of Judicial Choice,'; *supra* note 11 and *The Brethren, supra* note 7.

11

JUDGES AND ACCOUNTABILITY

RAJEEV DHAVAN

I

Steeped in the ideology of the 'rule of law', the Western liberal tradition seems to have great faith in judges, the judicial process and the judiciary. This faith is shared by critics of the liberal tradition who *either* believe in the 'relative autonomy' of the law and legal processes *or* share varying degrees of confidence in the capacity of the law and legal processes to be vulnerable to strategic use — whether defensively or otherwise — by the 'under' and 'non' priveleged.[1] Judges are not only seen as preserving certain self-created or received *standards and values* but perceived as doing so with a prized *independence* which is itself simultaneously structured and protected by a rigorous, refined and reliable *methodological discipline*. Faith in the judiciary seems almost to have the status of an ideology.

In most countries, linked to the common law tradition, this faith is presented by a somewhat unique and uncritical silence about the work of the judiciary. Critical analysis of the judiciary's work is limited to its jurisprudence, and for the most part lies hidden in legal discussions located in esoteric legal journals — surfacing into popular journalism and public controversy only in rare instances in the aftermath of acute controversy.[2] Even in countries where the decisions of the judiciary are critically analysed by social scientists, investigative journalism about the judges as people and the judiciary as an institution inspires public interest without too overt a public support.[3]

The faith in judges extends from a general faith in the judicial process to a personal faith in the judges themselves. The exclusion of judicial review from public law legislation provides occasion for public controversy.[4] Whenever a major political or social crisis occurs, judges are appointed to head commissions of inquiry which are established to look into and report on the state of affairs with a view to cushioning the pressure and/or providing a solution. Whether this is a good thing is another matter.[5] It does, however, represent faith in the judiciary in a diverse and extensive variety of public affairs.

There are so many questions about the judges which we refuse often to ask openly.[6] What kind of people are the judges? How do they operate amongst themselves? To what extent are judges a law unto themselves? To what extent are they restrained by their self-declared methodology? What is the network of social, political and economic relationships within which the judges operate? What is the effect of the politics of patronage on the appointment of judges? What are the financial arrangements within which judges operate? To what do judges owe their social and political status? Is the continuing political viability of the judiciary dependent on the acceptability of an ideology of which they are an important constituent? Can judges really strike an intuitive consensus about when they should interfere in a matter and when they should feign a guarded consensus? What is the pathological use of the judiciary as an institution? Who uses it and why? And to this catalogue of simple questions can be added a host of others. Many of these questions are asked from time to time — more so at a time of social crisis and controversy. Equally, there is an 'establishment' and management interest in the judiciary being seen to operate as a fair and efficient institution.[7] But debate on the judiciary is usually muffled — and often rhetorical and imprecise.

The real point in all this is: we do not hesitate to raise analogous skeptical questions about any other institution of government. Yet we happily have an 'others-abide-our-question-thou-art-free' attitude to the judiciary. Despite all this, there is no doubt that the judiciary is an extremely powerful institution. It makes extremely important decisions which affect the lives of the people as much as legislative enactments. Everyday appellate courts make decisions which have the force of law. In some constitutional systems, judges can formally set aside and invalidate legislative enactments. In other systems, judges frustrate the intentions of the legislature informally by a use of their extremely versatile juristic teachings. There is no doubt that the power of the judiciary — and here I am concerned primarily with appellate courts[8] is quite considerable.

The reasons for our asking so few questions about the judiciary are several. At a level of ideas, faith in the judiciary belongs to what has been called a 'hegemony of ideas' about Western liberalism. The judiciary is seen as freely and independently arbitrating over the cherished freedom of individuals in a manner that is fair, unique, exclusive and trustworthy. The judiciary sustains faith in a wider ideology irrespective of what this ideology cloaks in society. At a more practical level, the judiciary also legitimates this ideology by a policy of calculated infringement. It infringes on the interests of its consumers and the other organs of the State to a point where 'they-win-some-they-lose-some'. But a residual faith in the judiciary survives.[9] Governments who speak to a theory of liberal democracy find it convenient to accept the limited restraint of judicial review to quell imputations of autocracy. The judiciary is a power filter which manages more than its limits. In addition to a rectified governmental interest in maintaining a non-controversial judiciary, there are a great number of professionals — like judges, and lawyers and their clients — who want to retain control over the use of this important power filter without making the latter politically or socially fragile.

II

In this paper, I will try to examine one set of questions about the judiciary. These set of questions relate to the problem of accountability. Is the judiciary publicly accountable? If so, how and/or to whom? If not, why is it not necessary for the judiciary to be accountable? What, if any, are the forms in which the judiciary is, or can be made, accountable?

Accountability is used here to denote the manner in which a judiciary justifies its decision making.[10] This justification can rest on the assumption that it represents, is responsible to or influenced by some persons, groups or institutions. Alternatively, the judiciary may justify its work on the basis that it is *sui generis* because of the manner in which it operates or the method of its reasoning. Whilst these distinctions are explored later, it is important to remember that 'accountability' is not synonymous with the 'control of power'. Accountability is only a device used to justify, legitimate, explain and, *perhaps,* control the exercise of power.

III

Let us begin by making a distinction between primary and secondary accountability.[11] Primary accountability exists where an institution claims to be directly accountable — seeking to justify its decisions by reference to its own methods, work or structure. Secondary accountability exists where an institution claims to be indirectly accountable — claiming to justify itself and its work through some other institution.

The most notorious fiction in law is that judges do not make law but merely apply it. They are depicted as interpreters rather than creators of law. The law creating body is the legislature. Variations on this theme extend from the simple assertion that judges merely interpret the law[12] to Oliver Wendell Holmes' assertion that 'judges legislate but they do so interstitially'.[13]

All this fits very nicely with the political realities of the theory of separation of powers. Indeed, were judges to publicly admit to a considerable legislative power, patterns of appointment to their number would undoubtedly follow a different course of political patronage and control. Some judges in the English Common law tradition have taken care to claim to adhere to this fiction and have chided their colleagues who have pretended to more rigorous and conscientious declarations or confessions.[14]

This theory is also another way in which judges can claim secondary accountability for their work. It is a mechanism whereby they can say: "We are not primarily responsible for the law. We did not make it. We are responsible for the law only in a secondary sense — as interpreters of it." There are, of course, great difficulties in accepting this theory. The theory can strictly apply only in respect of statutory interpretations. It clearly fails in respect of the Common Law and Equity — unless we treat these areas as having been devised independently, by judges many years ago but as *now* constituting areas of received learning which the judges merely interpret.[15] It barely survives in respect of the interpretation of a constitution.[16] There are also other much rehearsed difficulties about whether the legislature has an intention or whether a statute should be treated as *sui generis*.[17] There is no doubt that judges possess discretion. To say this they are fastened securely by, and contained within interstices set by the legislature is to misunderstand the nature of their discretion and the method through which they operate. Undoubtedly, the wishes of the legislature — whether grasped by the judges intuitively or otherwise — may play a dominant role. But it all depends on the relative weight judges may wish to attach to legislative intent in preference to their own systematic and existential learning.[18]

Whatever the realities of the situation may be, let us explore more fully the implications of this plea of secondary accountability. The only other public servants who make such a plea are bureaucrats. And there are, of course, great similarities between the position of the modern judge and the modern bureaucrat. In most systems,[19] both the bureaucrats and judges are appointed by their number of political executive peers. Both influence in varying degrees, appointment to their number.[20] In both cases, some protection is given as far as security of tenure is concerned even though this reaches almost absolute proportions with regards to judges. Both exercise a considerable amount of independence and discretion albeit much more pressure is put on the bureaucrat by the political executive. And, most important of all, both claim to decide matters according to 'instructions'. In the case of the bureaucrat, these instructions take the form of 'laws', rules, decisions and specific orders. In the case of the modern judiciary, these 'instructions' are labelled 'law' and take the form of legislative enactments. In one sense, it would appear that the difference between the bureaucrat and the judge in all these matters is really one of degree. But these differences in degree give the judge a different kind of independence, status, style and working environment. In another sense, the difference in degree should not obscure much more fundamental differences between bureaucrats and judges. For if this judge is a bureaucrat, he is certainly unique. The concept of a judge is historical and sociological. What it means can only be understood in the context of this historically precipitated evolution. Accordingly, the independent style, function and status of the judiciary has acquired a distinct meaning of its own. On the other hand, the modern judge is undoubtedly part of a contemporary apparatus of power which takes into account and capitalises on this style, function and status. If the modern judge is allowed a certain relative autonomy, it is because it suits a large number of people — no less those who hold power as those who do not — to permit them to do so. Judges are a unique power filter through which power is exercised, controlled and contained.

The modern judge is, however, under tremendous pressure to be treated as a bureaucrat. The law that he deals with is increasingly becoming a matter of very detailed 'instructions' from the legislature. The philosophical inputs of the judge are decreasing and giving rise to an ill-defined pragmatism.[21] This pragmatism is at large in theory of judicial restraint which is part of the political question doctrine whereby a judge is not supposed to interfere in areas which are not earmarked as constituting his business. It is also present in the judge's day-to-day decision making which caution the judge to refrain from saying things other than those arising out of the declared, even if limited, understanding of social and political affairs attributed to him. In various parts of the world, politicians, impatient with their respective judiciaries, are seeking to bureaucratize the judicial function — constantly aware that this might weaken their power as much as it might strengthen it. Whatever, they might stand to gain by directly interfering with the judiciary may be offset by indirect social and political de-legitimation of their power.[22]

Be that as it may, the judge cannot make too extensive a claim for secondary accountability in the same way as a bureaucrat can. Firstly, as has been pointed out — the judicial power is qualitatively different from bureaucratic power in that the judiciary is not perceived as and does not operate as a derivative power. Secondly, secondary accountability, involves — both in theory and practice — a considerable measure of direct control by those who are alleged to possess primary accountability; and through whom secondary accountability is claimed. This does not, and cannot exist in respect of the judiciary without altering the latter's nature. Finally, the modern bureaucrats attempt to hide behind secondary accountability has itself been severely curtailed by the increasing demand that bureaucrats are, and should be, primarily accountable for a large part of the work. Many modern constitutional mechanisms have been created in order to realise this demand. Such constitutional mechanisms cannot be duplicated for the judiciary without making inroads into the concept of the judiciary.[23]

The judge can only make a limited claim of secondary accountability. He can certainly claim that some of the law which he is asked to deliberate on comes from a source external to the institution of which he is a part. He can also claim that some of his interpretative endeavours are — both in theory and practice — best understood in the light of demands and expectations of the legislature and the executive. Beyond this, judges are primarily accountable for what they do. And they must fairly and squarely meet the demands of primary accountability. A statement by a judge: "It wasn't me; it was them", can only be accepted with grave reservations.

IV

Accountability in the primary sense can be discharged by a claim to either structural or logical accountability. This distinction is implicit in the second part of this paper where the two senses in which accountability is used are explained briefly. Accordingly, a claim to structural accountability is made on the basis that the institution in question is structured in such a way that it represents, is responsible to or influenced by what might be a wide (or correct or sufficient) number and variety of people, groups or institutions. A claim to logical accountability rests on the assumption that the institution seeks to justify itself on the basis of the method of its reasoning or the manner and effect of its work.

In terms of structural accountability, the judiciary is influenced by a very limited range of inputs — both in terms of the people and groups who actually lobby the courts as well as the kind of information and learning on the basis on which the judicial decision is made.

First, let us deal with those who lobby the court. In the Common law world, the judiciary operates on the adversary method.

This means that the case is taken to court by two parties who take the case up through the appellate system. Although the ultimate decision in the case will become the law of the land, only the two parties are allowed to argue and directly influence the outcome of the case. Sometimes, various similar cases may be grouped together and these multiple appeals may be heard together. This may have the effect of broadening insights into the law in any particular case by presenting the judges with a wider number of fact situations.[24] Some courts tend to allow a considerable range of interveners in a case. Interveners represent varied societal interests who may be encouraged to present their views when an important issue is before a court. However, the policy of permitting interveners — which is really no more than an indecorous form of lobbying before courts — varies from country to country and is discouraged in most countries.[25] Some countries permit publicly interested 'busy bodies' — for want of a better expression — to have a sufficient standing in law to take a particular public issue through the courts.[26] Some countries set aside special mechanisms whereby certain issues can be specially earmarked for consideration by the courts. But the people who are allowed to influence the work of the courts are really quite few. Moreover, they are expected to exercise this influence through professional lawyers and certain designated forms of legal reasoning. Whilst it is true to say that the judge does, at least, have to listen to two points of view, it can hardly be asserted with any confidence that the range of people who can lobby the appellate courts is large.

Secondly, let us deal with the kind of information that the judge has to rely upon. He has to deal with the facts of the case. The consequences of his decision are directly highlighted only by those facts. The range of information that is made available to the judge is limited — in most systems — to legal arguments and legal reasoning. Some judicial systems encourage recourse to what has been called the 'Brandies brief'.[27] Such a brief consists of a portfolio of social and economic information outlining the social and economic background to the issue; and the possible consequences which may ensue. But such a brief is expensive. It is beyond the reach of most litigants. At least one Commonwealth court, took the view that litigant desirous of putting forward such a brief must be prepared to bear the consequences himself.[28] Very few appellate courts are endowed with research facilities.[29] No separate department advises them about their work, and what it will mean in terms of social realities and consequences.[30] Where such facilities exist, the energies and resources of this facility are spent on researching and resolving legal niceties.

Thirdly, the other structural influences on the judge are diverse and difficult to quantify. There is little emphasis on the training, and feed back to, judges. The judge is encouraged to be very much his own intellectual creature conditioned by his own limited training and specialised methods of reasoning.[31] He is not usually exposed to a range of social, political and economic realities which, he can best comprehend only on the basis of an indisciplined intuition. On social issues, a lot is left to the sociological imagination of the judge.

Finally, the judge is, of course; aware of the power structure within which he operates. He is aware that appointments to his fraternity ultimately rest with the executive who also control the manner and extent to which the judiciary is funded. Between them, the legislature and the executive have the residuary power to overturn judicial decisions. Judges are also indirectly greatly dependent on the executive to execute judicial decisions and to protect the power and status of the judiciary. A whole range of other influences also intrude on the judiciary. The judges themselves occupy a certain status and belong to a certain class.[32] They understand the expectations of some of the more powerful consumers of the judicial process, and are not oblivious to the power structure within which they operate.

It would be difficult to argue that judges can make a very strong case by way of structural accountability. They are influenced by too small a constituency of people, fed with too limited a range of ideas and information and constricted by a power structure which invisibly demarcates the limits of an effective judicial imagination. The judges' case for accountability must rest on some other foundation.

V

Ultimately, the judiciary seeks to justify itself on the basis that it is *sui generis.* Its accountability rests on the fact that it makes reasoned decisions. Its methods of reasoning constitute its accountability. This picture is best represented by showing the judge as part of a triadic structure.[33] The judge is seen at the apex of the triad deliberating on issues — that come from the base of the triad — in a manner that is independent, fair and reliable. He decides according to the 'law'; and defends what is called the 'rule of the law'.

The first reservation that one has about this picture is really an empirical one. It has been argued, and demonstrated that the judge is not really the neutral apex of the triad. Much rather, he is a participant with something to offer — just like, even though differently from, other participants.[34]

The second reservation is about the methodology of the judge and what inspires his reasoning. There is a great deal of controversy about what the fountain sources of judicial inspiration are. One set of explanations explain the ultimate basis of judicial decision making on an intuitive hunch.[35] Explanations about the nature of this hunch vary. Some regard the ultimate texture of this hunch to be arbitrary. Others say it is grounded in some kind of special understanding of the consensus of what people think. The latter explanation has recently been very elegantly put forward by a distinguished English judge.[36] Here the judge fulfils the demands of democracy through an intuitive process. Still another explanation rests on the fact that judges are creative people and can be trusted more than others. Justice Krishna Iyer — to whom this essay is dedicated — has himself put forward the somewhat guarded view that judges can be the sentinels of progress: "In the evitable chemistry of social change, judges are certainly not anti-catalysts".[37] But shorn of its unique appeal, this overall appeal to a refined intuition is really of the variety: "We are strange and wonderful people; trust us".[38]

And this takes us to the second set of explanations about judicial discretion. Here the argument is that there is, in fact, no such thing as discretion in the sense that the judge seeks to arbitrate over conflicting rights or interests in a manner that can be justified on the basis of a consideration of universally applicable principles.[39] This has rightly been likened to what has been called 'a noble dream'[40] — for that it most certainly is. It would be absurd to deny — as some have tried to do — that there is no method in judicial reasoning. But, the judge is still left with the enviable task of weighing and balancing the competing demands of various principles.[41] At some stage, the judge has to exercise judgement and make a decision. A different judge may come to a different conclusion. That is no reason for denying that a method exists. But, equally, there is no denying the fact that in exercising his judgment, the judge is exercising a considerable amount of discretion and power.

This power is not really controlled or influenced by any method of structural accountability. Nor is it right to say, that judicial reasoning provides the judge with the right answer.[42] In fact, judicial reasoning provides him with the dilemma of providing the right answer. The reasons for a judge's ultimate choice — although justified by legal reasoning as constituting a valid choice — are chosen by the judge on the basis of a not un-personalised judgement. For that he is not really accountable.

Finally, it has been argued that the judicial function can be defended on a totally different basis. Judges are seen as protecting a process of structural democratic participation rather than as making substantive decisions about public affairs. Thus, the judicial process is seen as ensuring that those whose rights have been taken away can fight for them administratively, legislatively and otherwise through processes that are fair, and open to all.[43] Accordingly judicial reasoning ensures a participatory justice. Whilst there is no doubt that judges are greatly concerned in both public and non-public law with processual and due process questions, this is only part of the judicial function. Judges do, and are expected to, pronounce on all kinds of substantive issues which constitute the bulk of their work.

Attempts by the judges to rely on pleas of logical accountability are also not wholly satisfactory. It is true that they do use methods of reasoning which are distinctive and provide a fuller explanation for what they do than most other decision makers. But their judgement exists as an independent variable influenced by a vast number of factors which do not emanate from this process of reasoning itself.

REFERENCES

1. The arguments about 'relative autonomy' and the 'exploitability of the litigation system' have to be considered together and independently. The legal system may be vulnerable to strategic use by the poor because it is 'relatively autonomous' (on this see Bob Jessop, "On recent Marxist theories of Law, State and Judico-political Sociology" (1980) 8 *Intl. Jnl. of Soc. of Law* 339). However, this is a weak argument. Firstly, the concept of 'relative autonomy' cannot be considered 'a-contextually' and independent of an analysis of 'power' and the 'State'. Secondly, we must not get too over-joyed about the dividends that the use of such a legal system may bring to the poor (as is the case with E. P. Thompson, *Whigs and Hunters* (1975). Such a use can only bring — at best — a 'corrective justice' rather than initiate an exercise in distributive justice. Thirdly, a considerable amount of skill and institutional organization is required in

order to exploit the legal system [(see M. Galanter) "Why the 'Haves' come out ahead: Speculations on the limits of legal change" (1974) 9 *Law and Society Review* 95]. Even then, we cannot be sanguine about the results.

2. This is certainly the case with the Indian Supreme Court in the aftermath of the Emergency (1975-77) on which see, U. Baxi, *The Supreme Court and Politics* (1980).
3. This is clearly the case in respect of Woodward and Bernstein's, *The Brethren* (1979).
4. We can think of three archetypical situations in which this is done. The first is one where the legislature seeks to oust judicial review. This is considered politically suspect. Thus, the British Nationality Act, 1981 was amended during its passage in parliament to allow for judicial review. The second situation is where the courts themselves are supposed to decide whether their jurisdiction can be ousted. The more socially and politically acceptable view is that the jurisdiction of the court's should never be ousted. Thus, the Indian Supreme Court came in for a considerable amount of criticism when it alleged that its jurisdiction was ousted by constitutional legislation enacted during the Emergency (1975-77); (see *A.D.M. Jabalpur* v. *Shivkanta Shukla*, A.I.R. 1976 S.C. 1206). A similar attitude was taken to the House of Lords refusal to review the removal of allegedly 'illegal' immigrants [see *R.* v. *Secretary of State for the Home Department Ex. p. Zamir*, [1980] A.C. 930; *Khera* v. *Secy. of State for the Home Department*, (1983) 14 February, *The Times*; and A. Nicol, *Illegal Entrants* (1981)]. The third situation is one where a legal system which denies such judicial review is regarded as totalitarian. [This was the view taken of the Emergency in India — on which see R. Dhavan, *The Amendment: Conspiracy or Revolution* (1978); and *Amending the Amendment* (1979)].
5. For the view that this affects the independence of the judiciary see M. C. Setalvad, *My Life* (1971) 509-10.
6. There is a great danger, however, in over-simplifying the questions we ask about the judiciary. A typical example of such over-simplification is J. A. G. Griffiths, *The Politics of the Judiciary* (1977). For an even more simplistic approach see U. Baxi, *supra* note 2. Questions about the judiciary should not ignore their discourse or the litigation practice they follow. A consequentialist impact analysis of what the judiciary has done, or could do, is not enough.
7. As examples, for England see, *Final Report of the Committee on the Supreme Court Practice and Procedure*, (1953) Cmnd. 8878; *Report of the Committee on Assize and Quarter Sessions*, (1969) Cmnd. 3909; For India see Law Commission: XIVth Report, *The Reform of Judicial Administration* (1958); *Report of the High Court Arrears Committee*, (1972); *Structure and Jurisdiction of the Higher Judiciary* (1978). It is important to stress that the declared interest in management and efficiency in these Reports may be spurious. In many cases from India, lawyers are happy to eke out strategic interim dividends an otherwise inefficient system. Reforms which introduce efficiency will disbalance such a pathological use of the system.
8. This is not to suggest that trial court cases cannot be used to raise local and general public issues. But trial courts do not usually create legal precedents for themselves and others. However, many of the arguments used in this paper — apart from those pertaining to the process of law creation — apply to trial courts as well as appeal courts.

9. Most people are reluctant to visualize the judiciary as a bureaucracy — however unique — within and strongly linked to, rather than independent of, the other agencies of the State. It seems absurd not to treat the judiciary along with other State agencies. [See further, R. Dhavan, *Judicial Decision Making: The Challenge of Democracy*, (1979). Papers to the Faculty of Law, Delhi University]; and also R. Dhavan, 'For Whom and For What . . . ." (1982 Paper to an International Workshop on the Effective Uses of Law, Ahmedabad, India).
10. I am more interested in thinking of 'accountability' as a device for the justification of the power structure, decision making process or specific decisions. I take the somewhat cynical view that public bodies in power are interested in this process of justification. However, and the discussion on accountability as justification does take us to ask questions about responsibility (*i.e.*, who was responsible for 'X'; see my later distinction between primary and secondary accountability), participatory in-puts (my category of structural accountability) and the method of reasoning (my category of logical accountability).
11. This distinction (explained in part in *supra* note 10) was drawn earlier in R. Dhavan, *Judicial Decision Making: The Challenge of Democracy*, *supra* note 9.
12. The most famous controversy on this was between Lord Denning and the House of Lords about whether judges can fill 'gaps' left by the legislature. The House of Lords thought they could not (see *Magor and St. Mellons Rural District Council* v. *Newport Corporation*, [1951] 2 All. E.R. 839 and Lord Denning, *The Discipline of Law* (1979) 11-17). However, despite the support given to Lord Denning [see Renton Committee, *The Preparation of Legislation* (1975) Cmnd. 6053] it is not clear as to what the extent of this 'gap' filling function is. More importantly, how does it affect our understanding of the judges accepting secondary accountability.
13. Justice Holmes in *South Pacific Co.* v. *Jensen*, (1917) 244 U.S. 205.
14. *Supra* note 12. See also the controversy between Justice Krishna Iyer and Justice Tulzapurkar in *Manohar* v. *Marotrao*, A.I.R. 1979 S.C. 1084; see further H. M. Seervai, *Constitutional Law of India* (1979) III, vii and 1874-1880 and R. Dhavan, "Judicial law making and 'committed' judges: Doctrinal differences in the Supreme Court and a recent case" (1978-9) 6 & 7 *Delhi Law Review* 24.
15. It is, perhaps, in this sense that Lord Devlin: *Samples of Lawmaking* (1962) 119 states that the common law ". . . cannot abrogate an existing principle of law and I doubt whether it is now ever likely to invent a complete new one."
16. For a range of views see L. M. Friedman and Harry N. Scheiber, *American Law and the Constitutional Order: Historical Perspectives* (1978). For a general study of the 'transformation' of American laws (other than the Constitution) see M. J. Horwitz, *The Transformation of American Law 1780-1860* (1977).
17. There is a controversy as to (*a*) whether statutes have an intent [see R. Cross, *Statutory Interpretation* (1976)]; (*b*) whether it is possible to find this intent [see M. R. Cohen, "The process of judicial legislation" (1914) 48 *Am.L.R.* 161; *cf.* J. M. Landis, "A Note on statutory interpretation" (1929-30) 43 *Har.L.R.* 886; G. C. MacCallum, "Legislative Intent" in R. S. Summers (ed.), *Essays in Legal Philosophy* (1968) 237] (*c*) whether it is a good idea to look for the intent [see D. Payne, "The intention of the legisla-

ture in the interpretation of statutes" (1956) 9 *Current Legal Problems* 96]; (d) whether it is useful to retain the fiction to limit the ingenuity of judges [F. E. Horack, "In the name of legislative intentions" (1932) 38 *W. Virg. L.Q.* 119]; (*e*) whether the techniques used by judges to obtain the intent are either too varied [see R. Dhavan, *The Supreme Court of India: A Socio-Legal Analysis of its Juristic Techniques* (1977) ch. II s. 1] or inappropriate [see F. R. Dickerson, *The Interpretation and Application of Statutes* (1975)]. From our point of view the question is whether the judges can plead secondary accountability. Much of the discussion in the literature cited in this note is a-historical. If the judiciary is viewed as a bureaucracy within the State, its 'interpretation' cannot be viewed in isolation. It has to adjust its interpretation according to pressures arising from the policies and politics of the State, its own need to project that it is following a consistent discourse and the pressures of litigation and litigants. To some extent, its plea for secondary accountability is valid. But the law gets so dramatically transformed by litigation, that the judges must accept some primary responsibility for this process of transformation.

18. Note R. Pound, "Common law and legislation" (1908) 21 *Har. L.R.* 383 at 385 outlining four choices:

> (1) They (i.e. the judges) might receive it (i.e. legislation) fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, or superior authority to judge made rules on the same general subject.
> (2) They might receive it fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law, regarding it, however, as of co-equal or co-ordinate authority in this respect with judge made rules upon the same subject.
> (3) They might refuse to receive it fully into the body of law and give effect to it directly only, refuse to reason for it by analogy but giving it, nevertheless, a liberal interpretation.
> (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to a strict and narrow interpretation, holding it down rightly to those cases which it covers expressly.

To this we might add the possibility that they might interpret it on the basis of a newly derived attitude consistent with an emerging view canvassed by the other agencies of the State or others.

19. Some of the alternative models are discussed in R. Dhavan and A. Jacab, *Selection and Appointment of Judges: A Case Study* (1978); see also C. M. Campbell, "Judicial Selection and judicial impartiality" (1973) *Juridical Review* 254-80. For our purposes, much of the argument would not alter in respect of 'elected' judges. 'Election' would only meet a preliminary requirement of structural accountability.

20. The 'patronage' factor in appointments is quite important. Some judiciaries have been able to gain control over this 'patronage' power (*e.g.*, England see: J. A. G. Griffiths, *supra* note 6 ch. II and the literature cited there). But appointments to the judiciary can only be considered after looking at the function and use of the judiciary in any particular system.

21. See W. T. Murphy and R. W. Rawlings, "After the Ancient Regime: The writing and judgments in the House of Lords 1979-80" (1981) 44 *M.L.R.* 617. But we must explain why the judges are behaving in this way. Operating

within a huge State machinery judges are anxious to be seen less as a decisional body on substantive issues and more as a body which negotiates the kind of process that is to be followed. Its decisional role is then increasingly limited to 'corrective' justice in the individual case.

22. The classic example of this was the attempt of Mrs. Gandhi to limit the power of the judiciary during the Emergency (1975-77) — on which see R. Dhavan, *supra* note 4.

23. Thus, it is not easy to devise a complaints or investigative procedure (like an Ombudsman) — other than appeals and judicial review — for the judiciary. The only method is to create bodies which will keep the work of the judiciary under review and suggest reformist changes (as in the case of the English Law Commission — even though this body does less than act as a corrective to the judiciary).

24. For example see R. Dhavan, *supra* note 17, ch. II s. 5.

25. *Ibid;* note P. Kurland's view in "Towards a political Supreme Court" (1969) 57 *Univ. of Chic. L.R.* 19 at 35.

> What we have come to see is the development of a lobbying practice, more decorous than the ones used in legislative halls but directed to the same ends. The Court instead of squealching this practice has encouraged it.

Indeed, it is a very useful instrument of creating patterns of structural accountability.

26. The issue of 'standing' is generally important to the issue of accountability. The limitation of 'standing' to parties who espouse a 'legal right' limits both the kinds of issues which can be raised before courts as well as the range of litigants who can raise them. A narrow policy of standing may be followed (*a*) to control the work load of the court, (*b*) limit the range of social and public issues which can be agitated or re-agitated before the courts, (*c*) limit the court's inquiry to narrow issues about individual rights rather than broader issues of social or public controversy. Indian courts following the American example have gone in for a liberal view of locus standi (see *S. P. Gupta* v. *President of India,* A.I.R. 1982 S.C. 149). This can be contrasted with England [see *R.* v. *I.R.C. Ex. p. National Federation of Self Employed,* (1980) 2 All. E.R. 378. *Cf. Covent Garden Community Association Ltd.* v. *Greater London Council,* (1981) J.P.L. 183].

27. This was first used in *Muller* v. *Oregon,* (1903) 208 U.S. 412.

28. *Samur* v. *City of Quebec and Attorney General of Quebec,* (1953) 4 D.L.R. 641.

29. The American Supreme Court and some other appellate courts are exceptional in providing research facilities to the judges. Most other courts depend on the judges doing their own research and relying on arguments made by the bar. The real controversy ought to be about nature of the assistance rather than the quantum for help. The judges should have social science help to, at least, gauge the consequence of their decisions.

30. The proposal for some kind of Ministry of Justice was made by B. Cardozo, "A Ministry of Justice" (1921) 35 *Harvard L.R.* 113. This was mooted in England by the *Report of the Haldane Committee on the Machinery of Government* (1918) and followed through in G. Williams (ed.), *The Reform of the Law* (1951) 9-21 and G. Gardner and A. Martin (eds.), *Law Reform Now* (1964). For a proposal for a department of judicial administration which will act as a courier between the judiciary and the executive and in which

judges and the executive will be represented see R. Dhavan, *Justice on Trial: The Supreme Court Today* (1980) Appendix. The judiciary and executive have much to discuss on matters of appointments, finance, jurisdiction and decision making.

31. Apart from America, the 'in-service' training of appeal court judges has generally been ignored. This is intimately connected with the general question of the kind of 'discourse' that is deemed appropriate for judges to follow. If the 'in-service' training of judges takes them beyond the range of existing legal discourse, this must, in the long run, affect the discourse employed by them.

    Apart from training, some experiments were made in India to try and get Supreme Court judges to discuss already delivered judgments with a diverse collection of critics.
32. Too much is made of this in J. A. G. Griffiths, *supra* note 6.
33. Note the literature cited in M. Galanter, F. S. Palen and J. M. Thomas, "The Crusading Judge: Judicial Activism in the Courts" (1979) 52 *Southern California L.R.* 699.
34. Consider A. Chayes, "The role of the judge in public law litigation" (1976) 89 *Harvard L.R.* 1281. *Cf.* Weschler, "Toward neutral principles of constitutional law" (1959) 72 *Harvard L.R.* 1.
35. See Judge Hutcheson, "The judgment intuitive: The function of the hunch in judicial decisions" (1929) 14 *Cornell L.Q.* 274; *ibid*, "Lawyer's law and the little, small dice" (1932-3) 7 *Tulane L.R.* 1; *cf. ibid*, "The status of the rule in judicial precedent" (1940) 14 *Univ. of Cincinati L.R.* 203 at 272.
36. See generally Lord Devlin, *The Judge* (1980).
37. Krishna Iyer J. in *Kunhu Mohammed* v. *T. K. Ummayithi*, (1969) K.L.R. 629.
38. Lord Denning in his Preface to this volume gives an interesting twist to this argument: "Someone must be trusted. Let it be the judges."
39. See R. Dworkin, *Taking Rights Seriously* (1979).
40. H. L. A. Hart, "The nightmare and the noble dream" (1977) *Ga.L.R.* 968.
41. Dworkin seeks to argue that this balancing act is not arbitrary or based on policy considerations but on some notion of 'equal respect and concern'. This is both philosophically suspect [see H. L. A. Hart, "Between Utility and Rights" in A. Ryan (ed.), *The Idea of Freedom* (1979) 77-98] as well as an inaccurate understanding of 'law' and the 'judicial process' [see, N. McCormick, *Legal Reasoning and Legal Theory* (1978)].
42. See R. Dworkin, "No right answer" in P. M. S. Hacker and J. Raz (eds.), *Law, Morality and Society* (1977) 58-84.
43. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

Part III

POLICY AND JUDICIAL DECISION-MAKING IN INDIA

12

POLICY AND JUDICIAL DECISION-MAKING IN ANCIENT INDIA

J. DUNCAN M. DERRETT

The rule of law requires that the executive and the judiciary shall be distinct, and this was recognised even in ancient India, at a period when the interference of the executive with decision-making might have been expected to be constant. This is rather remarkable: even more remarkable is the fact that the interaction of executive and judiciary was considered in some detail and with some care, and, in the course of this, factors bearing mutually upon the two elements of the state were briefly exposed.[1]

The final responsibility rested with the executive

There is no question but that the decision was taken in the name of the king. The king's permission was required before ordeals could be taken or oaths administered.[2] The king was even required, so the *dharmasastra* says, to see to it that persons, especially Brahmins, outcasted by their castes performed their penances prior to rehabilitation.[3] No decision was valid unless pronounced, so the same *sastra* tells us, by a court convened by royal authority even if the decision could be supported intellectually on *sastric criteria*.[4] A judicial decision was therefore not a question of getting a settlement which could stand up in terms of righteousness or appropriateness: it was clearly distinguished from an arbitration or any other type of dispute-processing. The properly appointed person or persons must hear and determine.

That there could be interference from the king or his friends we know full well from the *Mricchakatika*. That some judges could use litigation to supplement their income was taken for granted, for the *sastra's* animadversions on those who live by bribery are clear enough.[5] More enlightening are two classes of propositions which we find in the *sastra.* The first enjoins the king *not* to produce a decision by his own fiat.[6] The *sastra,* by the time we know it, is confident enough to enjoin him not to deviate from the *sastra.* But by that time the *sastra,* though it is a 'science of righteousness', has become highly practical, and has incorporated several safeguards within itself (see below). It was therefore not unreasonable to ask him to follow, wherever possible, the advice given him by his court jurist(s). Furthermore although the population are bound to respect the king's order,[7] and the latter must therefore be regarded as final *even though, on intellectual grounds it may seem to be unrighteous, inconsistent with dharma,*[8] the king, as the ultimate source of human justice, certainly has jurisdiction to recall judgements, to revise decisions, to revoke decrees, and to substitute *suo motu* different determinations from those already obtaining. This may well be done, our text avers, where the result would be more consonant with *dharma.*[9] However, before using this jurisdiction, the king should observe that the public expects him to treat as final any decree which has passed into effect, since legal transactions do require a basis of finality.[10]

The ambivalent role of dharma

From the point of view of the *dharmasastri,* the professor, who is always in danger of being told that his conceptions are 'too' academic, has a perfectly clear duty, although that duty is complex. He will have begun his life after all, studying the Veda, and thereafter *smrti,* first without the aid of commentary, later with the aid of commentaries and digests. The curious behaviour of tribes, castes, tribunals, courts, and kings was never an authority for him. In course of time he learnt that there was a *dharmic* answer to every problem, as valid in Kashmir as in the Tamilnadu. Now when it comes to *litigation* and decision-making, is he not to propound the *dharmic,* that is to say (from his point of view) the *sastric* answer to every practical question? At an ancient period, pre-historic so far as our surviving *sastric* materials are concerned, there emerged the intriguing formula, that *vyavahara* (the legal process) moved on four feet, namely *dharma, vyavahara, caritra,* and *rajasasana,* each later overruling each or all the previous in order.[11] Thus the ideal, *dharmic* aspect was considered first, e.g. that adultery is a crime; yet the *vyavahara* might not support this, since the court in question might not hear adultery cases, which might well be left to the caste-tribunal. If on the contrary the court had long since taken up family matters, or the case was between two different castes, the possibility of a criminal penalty for adultery was there — but this might be abrogated for these two parties by the fact that, e.g., the woman was of the washerman caste, and the man her client, so that 'custom' would overrule written law. Yet in that locality the king might have acceded to the requests of the washerman caste that adultery by their wives should no longer be permitted. Thus custom would be abrogated by royal order.

Thus the *dharmasastris* were perfectly clear that when it came to litigation the *dharmic* answer would by no means be the righteous one in every case! Furthermore the difficulties that could arise when it came to the *sastris'* actually advising the ruler or his deputy, are reflected in our texts.

The jurist is baffled when the problem is entirely outside his sphere. There soon arose a whole row of matters where the growing efficiency of government, particularly in central and southern India, made it desirable to recognise, as if *dharmic*, the jurisdiction of the king and/or his deputy to govern through administrative enquiry. The maintenance of peace and good order required that initiative be taken to forestall, as well as settle disputes, *including those which no individual litigant would have the courage or the inclination to bring before a regular tribunal.* Breach of the royal orders and interference with the revenue are good examples.[12] Now what role could the jurist play there? It is obvious that learning quite different from that of the *dharmasastra* would be required. And it is not simply a question of having recourse to experts, whose general utility as associates with the court is universally admitted. Our texts on this subject, which are relatively late, do not answer the question, since some general principles, to which we shall come, seemed to cover them.

If we turn to instances where the *dharmasastra* was unquestionably in point, the jurists might be puzzled by confusion in their sources, let alone in the application of any of them. Granted that we have in our minds' eye qualified jurists who are not mere academics, but are also practical men, it still remains to have some clue what should be done when texts are too categorical, or conflict with each other. Happily we have basic proposition which show that the points had not escaped the learned of ancient times. No mere written text should be applied unless its application was consistent with reason and equity.[13] Here figure the two key words *nyaya* and *yukti*, each characteristically vague, and difficult to translate precisely. With that element in the court's mind it is futile to have a simple recourse to *sastric* texts, however voluminous. Furthermore, where texts conflict, that text which, *in the precise circumstances,* would most nearly produce a just and equitable result was the text to be followed.[14] There was no fear of creating a bad precedent, since precedent was never accepted as a source of law.

The postgraduate student of *dharmasastra* soon learns that in decision-making *policy* comes into view, and should come into view, whatever written texts, even hallowed written texts, have to say, or seem to have to say.

The equipment of the jurist

One of the most interesting propositions to be found in the *dharmasastra* is that which requires, not only the qualities of calmness, social standing, and integrity, especially fearlessness,[15] in the chief judge and assessors who make up the effective body of any court holding the royal patent, but also an equipment in *arthasastra*.[16] Ever since the rediscovery of Kautilya's *Arthasastra* stimulated studies in the field there has been a widespread awareness how very different *arthasastra* is from *dharmasastra*. The latter emphasises what *ought* to be done the former what very well *may* be done: the latter is concerned with righteousness, the former with politics and economics. The court must be composed at least in part, of men who know the political and economic outcome of any advice they tender to the ruler or his deputy.

When this strange proposition first emerged, (strange to one who begins his law studies with *dharmasastra,* no doubt closer to the hearts of the public than mere *artha*), naturally a query emerged with it. What happens when the two sources of education and training conflict, as, in the nature of things they will? Now the *arthasastra* can, in the hands of a Kautilya, dutifully say (e.g. 3.1.44) that of course *dharma* really comes first! And it is inescapable that an undharmic king or minister is apt to become the target of disaffection, so that the executive have a general interest in regarding *dharma* highly and keep in within its margin. But what says the *dharmasastra* itself?

The judicial assessors must tender to the ruler the advice which, ideally he should follow, though he is not bound to follow it. And it must combine the requirements of *dharma* and *artha*.[17] The likelihood that he will follow such mature and well considered advice is very much higher than if they gave him an academic precept, and let him sort out what would be its practical effects, especially upon the state and society within the state. Where the teachings of *dharma* and *artha* differ, the *dharmasastra* says that the jurists are bound to give precedence to *dharma*.[18] And where the ruler shows signs of wilful, arbitrary, petulant, impulsive action, as many apprentice and ill-educated rulers will, the assessors must plead with him to consider the long-term effects of what he is doing, and urge him, since he is after all the authority of last resort, to pay attention to what the *dharmasastra* provides.[19] That was not a science discovered the day before yesterday, nor was any of it the fruit of fad, fancy, or fashion. *Dharma* has to do with individuals' welfare in this world and in future lives; but it also is a powerful governmental tool. The greater part of the *sastra* is concerned with social control, starting with the presumption that *varnas* and *asramas* must be supported by the king (*Arth.* 3.1.38). The balance between castes and classes must be maintained by him — and not by anyone else! Thus ill-considered, rash, impetuous, and emotive action on his part cannot but disturb a delicate equilibrium. This does not mean that things must stagnate. It has been said that *dharmasastra* was for a static society, and that the then function of justice was to maintain the *status quo*: but that cannot be said of the *arthasastra*, which is in so many places development-conscious to the point of being aggressive.

Conclusion

The public are aware of the idea of a utopia, a golden age, a *Ramrajya*. They are aware that students of politics and economics, of ways-and-means, can come up with many crafty and smart suggestions, ways of achieving purposes. They are aware that the *evaluation* of purposes and programmes is aided by studies of *dharma*, now somewhat weakened by its precepts' being out of touch with modern developments. They are aware that, as usual everywhere, what people *want* (or think they want) soon outstrips what they can justify: wants come first and reasons to achieve them tend to come afterwards. For the sake of their business transactions they want to know where they are. But they look to the ruler's judicial advisers in a matter of litigation to consider maturely both *artha* and *dharma*: for they believe that, in the long run, both must somehow be attended to.

Rulers knew, in pre-British times, that they were ultimately answerable to the public. Good rule, and in particular a good administration of justice was, in contemporary parlance, the equivalent of many sacrifices.[20] In other words it gave supersensory comfort, and some security to the public that they were in good hands. Part of that answerability surfaced as awareness that the solution to every judicial problem was a 'one-off' affair: but it must be arrived at, in India, if not in other civilizations, only after those who were authorised to apply their minds to it, and carried their distinct share of responsibility for the outcome,[21] had maturely weighed not only the traditional, conventional, and expected solution according to formal righteousness, but also the dictates of policy in the shorter and the longer view. And the one who carried final responsibility relied upon his *sabhyas* and his *pradvivaka* (the ancient word for the 'interlocutor' who managed the proceedings in open court) to be skilled not less in the one science than in the other.

My former colleague A. L. Basham once drew attention to the fact that copies of Kautilya's *Arthasastra* were very scarce by the beginning of the British period, that commentaries surviving on it were few and incomplete, that when a full-scale edition was called for (in the Trivandrum Sanskrit series) a new commentary had to be written by the editor, and that these circumstances made it difficult to believe that that extraordinary and unique book was in general use. Moreover, as it will occur to a reader of this article, if *dharmasastra* authors had really wanted their graduates to study *arthasastra* as a separate *sastra* and not as represented by the bits filtered through the ancient *smrtikaras'* minds they would have said so explicitly. However, several years afterwards I was able to draw attention to a group of inscriptions belonging to the twelfth century[22] which dealt with a most embarrassing problem which is still with us. Artisan castes, then as now presuming to wear the sacred thread, claimed to be twice-born and thus, no doubt, to share in privileges of twice-born castes: they were aspiring, in a period of an unexampled boom in temple-building, to be not merely craftsmen but also architects, and to consolidate social gains at the same time. The state, as always, was the arbiter of caste ranking, but the decision was not given on policy alone. The matter was referred to committees of Brahmins, who had to adjudicate on this very controversial and delicate matter. They explicitly say that they consulted Kautilya, and it appears that they quoted him. They set out their *dharmasastra, silpasastra*, and (apparently) *arthasastra* source material before giving their conclusion. When exactly the same problem came up again in 1809, the District Judge of Kumbakonam referred the matter to his single 'pandit',[23] who referred him to Manu 10.6,40. F. W. Ellis protested at the Judge's assumption of jurisdiction: how far was the *dharmasastra's* concept of judicial competence to be followed?

However that may be, we can be quite sure that in the twelfth century, within a few years of Vijnanesvara's writing his *Mitaksara*, the Brahmin referees in such extremely delicate socio-economic matters regarded themselves as bound to consult not merely *dharmasastra* but also the technical literature of the speciality (in this case architecture) *and arthasastra* as well in the shape of the textbook of our old friend Kautilya, whose name, by the way, they had domesticated as 'Gautilya'.[24]

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2. Texts quoted by Vacaspati-misra at Rocher, texts 590-600, 644-47. The suitability and choice of an ordeal or oath was a technical matter.
3. Derrett, 'The king's role relative to penance and a text of Yama', in R. Nagaswamy, ed., *South Indian Studies* II (1979), 1-7. The principle was observed until recently in Nepal: A. Hofer, *Caste and State in Nepal* (1979), 193ff. A. K. Majumdar, *Chaulukyas of Gujarat* (1956), 349-50, citing *Lekhapaddhati* (1925), *krsnaksara-ujjvalaksara-vidhi*, shows how, at any rate in the 13th century, malefactors disowned by their families could only be reinstated by the court after initiative taken by those families, the payment of fees, and an investigation of reformation, and a warning by the court.
4. Katyayana (Katy.) 68 (the verses are numbered according to Kane's edition and translation, (1933).
5. Brhaspati 1.107 and Visnu at Vacaspati-misra, texts 50-52.
6. Katy. 44.
7. Manu 7.13. For different interpretations of this difficult verse see Derrett, 'Bharuci on the royal regulative power in India', (1964) 84 *J. Am. Or. Soc.* 392-5.
8. Manu 9.233 discussed at Derrett, '*Tirita* and *anusista* . . .', Z.D.M.G. 126 (1976), 312-18. Katy. 81. A *sabhya* can be required to compensate a litigant whom he has damaged.
9. Yama quoted in Vacaspati-misra, text 16. Such is the teaching even of Katy, 51.
10. *Supra* notes 7 and 8. Naradiya-manusamhita 1.65.
11. Arth. 3.1.39. Katy. 35-43. Derrett, *Religion, Law and the State in India* (1968), 148ff; R. Lingat, *Classical Law of India* (1973), 168; S. N. Mithal at Ann. Bhand. Or. Res. Inst. 56 (1975), 77-91 (agreed: these are sources of law).
12. Pitamaha studied by J. Jolly, *Hindu Law and Custom* (1928), 268-70 and Derrett, 'Some features of public law in smrti sources', (1978) 42 *Adyar Lib. Bull.* 1-31.
13. Naradiyamanusamhita 1.40. Brhaspati 1.65, the text *kevalam sastram asritya* . . . referred to by Kane, 867, n. 1684. Bhavisya-purana quoted by Vacaspati-misra at text 10. See *per* Madhavan Nair, J., at *Kunhikannen* v. *State of Kerala*, 1968 Kerala Law Times 19, 23; *nyaya* at least appears at Arth. 3.1.43. It does not follow that there it means *rajasasana* (Kangle), though the identification is tempting.
14. Yajnavalkya 2.21 holds that reasoning based on the practices of *sistas* ('disciplined' model persons) was of greater force. Kane, 866. Lingat, 168.
15. Katy. 57-59, 63-5. Arth. 3.20,24: evam karyani dharmasthah kuryur acchaladarsinah / samah samesu bhavesu visvasya loka-sampriyah.
16. Yajn. 2.1. Katy. 57, 63, 66, 71, 77. Katy. 32 actually says that *dharmasastra* and *arthasastra* are the two main branches (of *vyavahara*). It has been argued by Kane, following Vijnanesvara on Yajn. 2.21, that by '*arthasastra*' is meant *arthasastra* material embedded in *dharmasastra, e.g.* the *drstartha* material in Manu and Yajnavalkya. Varadachariar was sceptical; and that incorrect notion is refuted by R. C. Hazra in his *Kautilya Studies* 59-87 (published originally in *Our Heritage* (1963) 11/2. It is very curious that both Vijnanesvara and Apararka, commenting on Yajnavalkya misuse Apastamba-dharma-sutra 1.9.24,23. The text actually means that the penances prescribed apply to one who when a *dharma* course is open to him opts for an *artha* one. The two mediaeval jurists

understand him to mean that when the penances are actually undergone *instead of punishment inflicted* (sc. by the state) we have an instance of *dharmasastra* ousting *arthasastra*. If no more apt illustration could come to mind that is most suggestive. That *dharmadhikaris* and *pranvivakas* must be learned in *nitisastra* and *arthasastra* respectively, and that the pair of them must be *artha-kusala* is stated at *Manasollasa* I.ii, 94-95; xx, 1255.

17. Katy. 77. Yajn. 2.1. See last note. Jimutavahana, Vyavahara-matrika, ed. A. Mookerjee, *Memoirs of the Asiatic Society of Bengal* 3 (1912), 278. Mitra-misra, Viramitrodaya, quoted by Varadachariar, 51.
18. The ambiguous Apastamba passage *supra* note 16, cannot be taken as conclusive. Yajn. 2.21. Narada 1.31. Katy. 20. So Vacaspati-misra, text 10, following the Bhavisya-purana. Kane, 868.
19. Katy. 73-78. So *ibid.* 12-13 (the king might lose his kingdom).
20. Yajn. 1.359-60. Brhaspati 1.96-8. *Cf.* Katy. 14; Naradiyamanusamhita 1.33. The king who is guardian of *dharma* hearing cases in a properly constituted court goes to heaven (Katy. 56). The king who protects subjects according to *dharma* goes to heaven even according to *arthasastra* (3.1.41), which is alleged not to be much concerned with 'heaven'!
21. Manu 8.18. Katy. 73, 75.
22. There is a group of inscriptions, one is nearly complete, one fragmentary, and one somewhat incomplete. On No. 558 of 1904 (Tiruvarur) and No. 479 of 1908 (Uyyakondan Tirumalai) see a note at Lingat, *supra* note 14 at 273-4, and a fuller discussion in Derrett, *Essays in Classical and Modern Hindu Law*, I (1976), 86ff. (a revised and updated version of an article in the Festschrift for Prof. K. A. Nilakanta Sastri, Madras 1971, 32-55).
23. See 2 Strange, *Hindu Law*, 263. The problem is by no means over. A member of an artisan caste (Rathakara) actually corresponded with me on the subject and sent me an inscription allegedly certifying the high status of this aspiring community.
24. That various works of *arthasastra* were studied as well as *smrti* in the countryside by state-subsidised Brahmins is clear from remarks in inscriptions published at Epigraphia Indica XIII, 329-33 (line 54) (Dharwar dist., A.D. 930), and at Epigraphia Carnatica V, Arsikere, 38 (c. A.D. 1200) respectively. And Kautilya III. 14, 29-30 is quoted by Narayana, pupil of Vijnanesvar about 1120, in his *Vyavahara-siromani* (see *Ann. Or. Res.* (Madras) 4-5 (1939-41), 29.

13

JUDGES AND DISTRIBUTIVE JUSTICE

JAGAT NARAIN*

Philosophy of the Indian Constitution: *Distributive Justice*

Any scheme for a distribution or redistribution of resources -- whether in a state or in the world — must find its ultimate justification in moral, not legal (using the word in its narrow, positivist sense), philosophy. For, legal justice in its orthodox sense is concerned with the doctrine of 'equality before the law' or 'equal protection of the laws', as in the case of article 14 of the Indian Constitution, which demands that similar cases should be treated similarly and unlike cases should be treated differently, while applying the principle of reasonable classification in light of the social purpose and objectives sought to be achieved by the state. But whether or not the desert principle is applicable in a given case, at a deeper level it will be found that all situations of allocation of goods and sources fall within the domain of what is often known as *social* justice which in turn requires distribution and constant redistribution of resources.

The concept of social justice has its true basis in the principle of human need, a principle which is based on the notion of a minimum level of human need, applicable universally, below which a person would be regarded as poor in the absolute sense.[1] But, though the actual content of such need is objectively determinable according to scientific principles as regards food, clothing, health care, shelter, environment, education and other essentials basic to a common standard of living set universally (akin to Rowntree and Beveridge standards set in relation to the United Kingdom), the philosophical justification of redistribution of resources, which is entailed, must rest as much on the fundamental principle of human diginity or self-respect as on the equally important principles of freedom and equality. Perhaps the best way to describe this position would be to identify the great principle of human brotherhood.[2] This principle constitutes the essence of man and of human civilization because without it and without the element of mutual aid and cooperation necessarily involved in it, human beings would be reduced to a savage condition where they are, in Hobbes' terms, in a permanent state of war with each other bent upon mutual annihilation. Even so the principle itself, on which any conception of distributive justice must rest, is not existentially factual, but is defined teleologically.

It is here that the Directive Principles of State Policy of the Constitution, read with its Preamble, and the role of the judges in relation to distributive justice contemplated by these central parts of the Constitution become important. Articles 38 and 39 are directly relevant here:

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life . . . (Article 38)
>
> The State shall, in particular, direct its policy towards securing —
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. (Article 39)

It is evident that the Preamble as well as the Directive Principles contain what Dworkin would call as 'principles, policies and other sorts of standards', as distinct from rules of law, i.e. either as standards — called 'policies' — setting out 'goals' to be achieved, generally leading to improvement in economic, political, or social feature of the community, or as standards to be observed not because they will advance or achieve some economic, political or social objective but because they constitute a requirement of justice or fairness or some other dimension of morality.[3] This point gains strength from article 37 which makes the Directive Principles "fundamental in the governance of the country" and declares it to be "the duty of the State to apply these principles in making laws". These principles are thus constitutionally binding on the State, even though they are not enforceable in but are only taken into account by a court of law in determining the constitutional validity of a law.[4] That point is also strengthened by the Preamble, as amended by the Forty Second Amendment which, *inter alia,* declares India to be a "Socialist" Republic and states the objective to be to secure to all citizens social, economic and political 'justice' and 'equality' of status and opportunity, which in turn requires on any definition of socialism, justice and equality, distributive justice through a constant redistribution of resources.

It should be pointed out here that while the Directives in a broad sense are prime examples of principles, implementation of such principles is dependent upon the policy aims of the state. A notable lead in this regard was given by the introduction of the Twenty-Fifth Amendment of the Constitution which expresses the policy of the state in implementing article 39 (b) and (c) and which protects against unconstitutionality, laws relating to compulsory acquisition of private property by the state and seeking to implement the provisions of that article, so long as some amount of compensation or some principles determining such amount have been laid down by the legislature. Protection of this policy aim was a significant boost for the relevance of the distinction between principle and policy in the area of distributive justice in India, a distinction which the courts were expected to observe, and it demonstrated that such justice *operates* rather as a policy than as a principle. The question then is whether the demands or perspectives of such justice are located in government as a matter of policy or in courts through their power to identify, interpret and even lay down principles of justice. It would seem that in an economically developing country such as India, such demands or perspectives and their implementation are most appropriately located in governments understood in a wide sense so as to include the legislature. But it may be that they are not wholly and exclusively located in governments. The courts also have a place, *albeit* subsidiary, wherefrom those demands or perspectives emanate. Indeed, the people at large, in whom the popular sovereignty resides, are in themselves a very important source of these phenomena, a source which no elected government can afford to overlook.

Whether the demands of distributive justice in a developing democratic country, involving a redistribution of property and wealth (and power), are consistent with the principle of rationality and all that it involves is a question which deserves some treatment here. It has been assumed by some people that such demands are not so consistent when rationality is understood to include the factors of efficiency and consensus-based collective choice.[5] There appears to be some inconsistency between the two when rationality and efficiency aspects are taken into account in their narrow, meritocratic sense. But this is in fact not so because in long run, and in not too long a run, the redistribution is bound to lead to a much wider and more productive effort than what a narrow rationalist principle would. A similar reasoning applies to Rawls' theory of justice which focuses on the 'lexical difference principle', within the general conception of justice, *viz.*, 'arrangement' of social and economic inequalities so that they are 'to the greatest benefit of the least advantaged and attached to offices and positions open to all under conditions of fair equality of opportunity.[6] A redistribution of resources envisaged by the Directive Principles and the Preamble would certainly be much more radical and wide-ranging in its effects than the Rawls' difference and rational principles, the underlying assumption of which is that persons in the 'original position' are rational and do not take any interest in each other's interests, and in this sense would be in breach of the two principles. In short, the rationality of the parties and their situation in the original position (*viz.*, mutual disinterestedness and the veil of ignorance), guaranteeing that ethical principles and conceptions of justice have some rational connection with 'the advancement of human interests broadly defined',[7] are conservative principles which have little place in a society needing a wholesale, *albeit* non-violent, surgery through a redistribution of resources. Such redistribution is envisaged not only by the Directive Principles and the Preamble but also by article 19(6) (ii) which, *inter alia,* provides as follows:

> . . . . nothing in [Article 19(1) (g) which, *inter alia,* guarantees to all citizens the right to carry on any occupation, trade or business] shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

This clearly envisages nationalization of industries and means of production as part of the redistributive strategy and so prevents any challenge to a law in such regard: A private firm forced out of business by State competition or monopoly under a law cannot complain of infringement of any fundamental right to trade or business. It is noteworthy that even before the Forty-Second Amendment of the Constitution, which declared India to be a "Socialist" democratic republic, the Supreme Court had declared that this article is based "not on a pragmatic approach but on the doctrinaire approach which Socialism accepts".[8]

The problem of distributive justice cannot, of course, be viewed in isolation. In a mixed economy, though socialist-oriented or socialistic in the British, Fabian sense, such as that of India, private enterprise has its due part to play in the country's economic development, and economic growth is undoubtedly essential before redistribution can have a real meaning. But the mistake is to think in black and white terms and so to believe in the myth, long held by many, that an equitable distribution of property or wealth and economic development or growth are incompatible with each other. On the other hand, one does not need to draw in support expert psychological evidence to make the point that fulfilment of the sense of justice in the community is bound to produce an incentive in the ordinary people in the community to work harder and more creatively and efficiently, an incentive which is curbed under conditions of injustice and oppression. And in a socialist-oriented and planned, though mixed, economy alone can a developing country such as India be ever able to provide full opportunities to hundreds of millions to find work according to their strength, interest and aptitude, which is envisaged by article 39(e) and (f) of the Constitution which, with a great deal of passion and gloom at the same time, provides:

> The State shall, in particular, direct its policy towards securing. . .
>
> (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
>
> (f) that childhood and youth are protected against exploitation and against moral and material abandonment.

Through this method alone can each member of the community be able to contribute to the best of his ability to the economic development of his country. An approach based on pure Western capitalism, though that, and the American judiciary's support for it,[9] may have led to that country's economic development, is likely to lead to even more massive than the existing unemployment in India and hence to considerably less total economic growth than even at present. For such an approach in India is likely to invite heavy industries on a large scale, with consequent misery and ghettos for the urban poor and little employment for the millions in rural India. On the other hand, in a mixed economy where the individual and village self-sufficiency and self-determination, implicitly required by articles 40 and 43 providing for establishment of *Panchayats* as units of 'village self-government' and cottage industries, is stressed, the typically Indian quality of peaceful cooperation on an equal basis (instead of domination and exploitation in the purely capitalist world) is bound to prove itself as uniquely suited to economic growth in the best sense.

Thus, the view that a more equitable distribution of wealth leads to a slowing down of the rate of economic growth is misconceived and has no theoretical or practical basis. Quite the contrary. As Professor Galbraith has shown in his classic work, *The Affluent Society*: "Reform (a more equal distribution) is not something that can be made to await on productive advance. It may be a prerequisite to such advance."[10] He adds: "Not only is there no inconsistency between the mitigation of insecurity and the increase of production, but the two are indissolubly linked. A high level of economic security is essential for maximum production."[11] Finally, he produces concrete evidence from several countries to show that an egalitarian country in the non-communist world has one of the highest rates of capital formation and that countries where inequality is greatest are among those with the lowest rate of capital formation (all or most gets spent).[12] Nevertheless, what I am arguing for is not egalitarianism either in the Western sense or in the communist sense but rather in the sense of a more equitable distribution of resources and an assurance of adequate welfare for the poor, though this might lead to a lessening of inequality, which alone can free them from the shackles of social and economic insecurity which in turn is a pre-condition to one's ability to contribute towards economic growth. This point finds ample support from economists who are almost unanimous in their view that a more equitable distribution of assets and income far from producing uneconomic holdings of land and other resources has and will lead to a greater productivity in agriculture and industry. Thus even an otherwise conservative body like the World Bank has endorsed the thesis of redistribution with growth in a book published in 1974. This book points out that in practice the income levels of the poor in developing countries are so low that any increase in their consumption standards will make them more productive, that the line between asset and consumption transfers is difficult to draw, that consumption support treats not merely the symptoms of poverty but also the causes of it, and that the impact of redistributive policies must have a measure of permanence.[12] More specifically, studies of several developing countries, including India, have shown that redistribution has been accompanied by significant growth, sometimes growth at very high rates in comparison with what most other countries have achieved, and that in India it is not redistribution of assets or income but the paucity of surplus left to help the poor through social welfare programmes and to increase investment, because of low rates of profit in public enterprises and huge subsidies in supporting prices paid to big farmers and wages and salary increases paid to white-collar workers, which explains why the country has had a poor growth rate during the last two decades.[13]

Rawls has apparently a valid point, and this especially applies to India, in his thesis that people's holdings ought to be equal unless there is a moral reason to the contrary, that egalitarian demands are not motivated by envy but by resentment of injustice and that the basic structure of a society should be so arranged that the natural capacities of a person are arranged for the good of the least fortunate as a common asset.[14] For this reason Nozick seems wrong to criticise him for such position on the ground, *inter alia* that he supposedly fails to recognise the individuality of persons and regards them merely as means and not as ends-in-themselves and that he ignores 'desert' as a basis for distributive justice.[15] And, similarly, Nozick is unrealistic in thinking, especially in relation to a developing country such as India, that the major portion of distribution in a free society does not come through the actions of the government.[16] However, even Rawls' thesis seems to proceed on the assumption that the least fortunate are always in some minority position and so can be reasonably helped by the privileged top class and the middle-income group or middle-class constituting the majority such as in the United States. This may not be true of India where 80 per cent of the population is poor in the absolute sense and where a redistribution of property and wealth of the remaining 20 per cent may not be *fully* able to resolve the inequality problem satisfactorily. Following from this situation comes the basic point stressed earlier, *viz.*, it is need which is the core of distributive justice and it is not true, as Lucas says,[17] in relation to India at any rate, that need is a necessary but not a sufficient condition of distributive justice and even that there are differing criteria of need. For unmet human need lies at the heart of the problem of distributive justice in India.

It is here that Rawls' pursuasiveness again becomes evident. He is right to emphasize that an important aspect of distributive justice consists in the background institutions and the process of allocation by them of total income, wages and other income and transfers and not in a competitive determination of total income which ignores the claims of need and of appropriate standard of life.[18] And so is Sen who argues that need should have priority over desert as a basis for 'distributional' judgments as such, to which the concept of inequality belongs.[19] But it is not clear why he puts so much *emphasis* on 'measurement' of need in the scientific sense,[20] in a situation of mass poverty which is there for all to see and which has at the same time a dynamic, not static, character in a developing economy.

There is in any case the possibility of achieving some redistribution through taxation and through 'necessary adjustments' in property rights and wealth (including means of production). The main purpose here is not to raise revenue (release resources to government) but gradually and continually to correct the distribution of wealth and to prevent concentration of power detrimental to the fair value of political liberty and fair equality of opportunity.[21] The role of this twin method and its counterpart in the compensation method, interestingly shown by the Supreme Court's decision in *Kunhikoman* v. *State of Kerala,*[22] where payment of compensation for compulsory acquisition of property by the State was in issue, has been considered fully elsewhere.[23] And methods such as expenditure tax or consumption tax can also prove useful within limits.[24] Suffice it to say here that the ability to pay, as in the case of taxation, is not different from the ability to receive less compensation in cases of compulsory acquisition of private property and is therefore consistent with the equal protection guarantee of the Constitution. However, Rawls is not right to emphasize that the theory of justice assumes that there is a *definite* limit on the strength of social and altruistic motivation.[25] In a country like India with its tradition of unselfishness, altruism and community spirit, Rawls' limit can be indefinite and elastic and any theory of distributive justice must take account of this fact. And in any case the principle of 'justice as fairness', argued for by him, expresses, in the context of Indian social and economic conditions, a more conservative philosophy based on the need to keep the Western capitalist economy intact in its essentials and to promote large-scale industrialisation than is contemplated by the Constitution itself.

The judges and distributive justice

It is, however, not taxation and akin devices but redistribution of property rights, wealth and means of production which has provided the most significant aspect of the actual role of the judiciary in relation to distributive justice under the Constitution. The story begins with the refusal of the judges of the Supreme Court, despite the redistributive requirement inherent in the philosophy of the Constitution and the State's duty to achieve social and economic justice and freedom from want, to accept the judgment of the State in such regard in the area of property rights. This happened in the court's decisions especially on article 31 which mainly required payment of 'compensation' in the case of compulsory acquisition of property. Space does not permit me to deal with all the cases in such regard, which have been discussed elsewhere,[26] but an attempt will instead be made to deal with one problem which can be said to be somewhat central to and illustrative of the relationship between the judiciary and the legislature in the area of distributive justice.

Before dealing with the aforesaid problem it is important to be clear about the theory behind the Supreme Court's role in distributive justice. There is one view, put forward by Dhavan and Merrillat, which puts emphasis on the text of the Constitution and on what the published reports of the Indian Constituent Assembly debates say.[27] There is much force and pursuasiveness in this view, especially if orthodox methods of ascertaining the intention of a constitution and of its makers are relied upon. For those debates do in a way reinforce the argument that the Assembly was not sure, and did not express its intention unequivocally, on certain important questions, and may even have distrusted any judicial role, especially on whether the owner of property compulsorily acquired by the state should be fully compensated. On this view, euphoria and trumpeted up expectations from the Supreme Court should not be allowed to dominate the conception of judicial function which must be objectively and impartially arrived at. This is indeed a meritorious argument which ordinarily must be accepted without question. The difficulty with this view, however, is that it seems to put less emphasis on the *presumed*, as distinct from the expressed or lack of expressed, intention of the makers of the Constitution as evident not so much from what they actually said or did not say as on what they had said before repeatedly and had implied and what they would have said had they cared to raise all the relevant questions which could arise in the future *and* to answer them with the precision of a court of law, a function which was not to be reasonably expected of them unless one sits in judgment over them and over their human fallibility with the benefit of hindsight and with the dissecting tools of the last quarter of this century. Due allowance must be made for the fact that making of the Indian Constitution, especially the part relating to social and economic justice, was not an ordinary act or event. Indeed, it was neither ordinary nor an act or event. It was special and extraordinary in every sense because the issue of distributive justice had occupied the minds of all the leaders of the national independence movement who were also makers of the Constitution and they were unequivocal about what they wanted in the area of social and economic reform and revolution (*kranti*) in a peaceful manner. And it was not an act or event because the actual making of the Constitution was a process which lasted not just for two or three years but, informally, for some 20 years since the time when the national independence movement in the sense of a movement for political, social and economic liberation of the country was positively born for the first time *i.e.*, when the *spirit* of the Constitution was born. On such view, the Supreme Court and any independent observer would be right to recognise, judicially or as an objective phenomenon, the *philosophy* of the Constitution as evident from the presumed intention of its makers (Founding Fathers) gathered not only from the Constituent

Assembly Debates but also from the history of the independence movement. It is therefore to be hoped that the approach of Dhavan and Merrillat would be broad enough to accommodate the philosophical dimension of the Constitution on questions of distributive justice where, as argued by Austin[28] and by myself[29] separately, the Supreme Court was to be an arm or vehicle of social reform and revolution in partnership with the legislature and the executive for the purpose of carrying out its constitutional duty to implement the Directive Principles.

It is now appropriate to consider briefly the saga of the Supreme Court's treatment of the problem of payment of compensation for private property sought to be compulsorily acquired by the state as illuminating panoramically the entire area of distributive justice. This may be divided into three stages, which are to an extent overlapping, as follows: (1) Agrarian reforms era (1949-53). (2) Economic planning and socialism era (1954-74). (3) Emergency and post-Emergency era (1975-77).

(1) *Agrarian Reforms*—Perhaps one can begin by pointing out that in 1950 Parliament amended the Constitution as a response to Bihar High Court's decision in *Kameshwar Singh* v. *State of Bihar*[30] holding unconstitutional (contrary to the 'equality before the law' guarantee of the Constitution) a state law providing for a graduated scale of compensation relating to the size of the holding of agricultural land. The amendment introduced articles 31A and 31B in the Constitution by which all agrarian reform legislation was virtually protected against any challenge on the ground of unconstitutionality. Individual speeches in the Constituent Assembly might lead one to the view that the Assembly was not sure about whether 'just' or 'adequate' compensation ought to be paid for any land compulsorily acquired from the landlords (*zamindars, jagirdars, etc.*) for the purpose of giving it to the peasant or the tiller of the soil. Yet, it is a well-known fact, of which judicial notice can and ought to be taken, that a very important objective of the national independence movement was to bring about agrarian revolution and to ensure that no legal or constitutional obstacles came in the way of achieving this objective. This basic point was overlooked by the majority of the judges in the Supreme Court when the *Kameshwar* case came before them for consideration. They held that parts of the impugned legislation, under which the state sought to acquire rents and other debts due to the landlords and give them 50 per cent of the value of these debts as compensation, amounted to acquiring a chose in action for no public purpose (land reform) and hence was a 'colourable' legislation and outside the power of the legislature.[31] The fact of the matter was that the majority resorted to alien and antiquated notions of nineteenth century *laissez-faire* individualism evident in the

American constitutional doctrine of 'eminent domain' and rooted in Blackstonian view of the function of law. And in any case even the so-called doctrine of colourable legislation should be used with circumspection and with a full knowledge of its limitations, as Dhavan has argued.[32]

For a long time it seemed that constitutional obstacles to unhindered economic progress consistent with the demands of distributive justice had been or would be overcome. But this was not to be. For instance, one of the basic aims of the national independence movement and of the Constitution was that the land, in addition to belonging to the actual tiller of the soil, should be equitably distributed and at the same time be an economic holding. This meant State acquisition, consolidation and redistribution of land equitably. The terminology employed by Parliament in amending the Constitution did not meet the judiciary's formal requirements for an expression of intent to carry out agricultural reforms. Hence came the Seventeenth Amendment in 1964. It re-defined the expression "estate" in article 31A to include various forms of land holding the position of which was previously open to doubt at the judicial level, *e.g.*, lands held under *ryotwari* settlement (where no intermediary was involved), land held or let for purposes of agriculture or for ancillary purposes, including waste land, forest land, for pasture or sites of building and other structures occupied by cultivators of land, agricultural labourers and village artisans. The amendment further added 44 legislative enactments in the Ninth Schedule of the Constitution which were retrospectively validated by article 31B. It was also found that in consolidation schemes and other agrarian reform legislation the interests of the actual tiller of the soil in holding even a small quantity of land were not properly safeguarded against possible encroachment by state officials who had been found to be prone to be indifferent to his interests. Hence the amendment provided that where a law provided for acquisition of such a land within the ceiling limit, the state must pay compensation to him at the market value. This, again, was a prime concern of all those in the national independence movement who were interested in distributive justice in rural India. Indeed, among the whole group of property provisions in the Constitution if there was a need for provision of compensation on grounds of social justice, it was for the actual tiller of the soil and, consequently, it would seem inconsistent with the intent of the Amendment for a law to provide for taking away of the tiller's land in bits for 'common purposes' in a consolidation scheme, even though the State *Panchayat* is not the beneficiary.[33]

The view that article 31A must be given a wide and comprehensive meaning so as to enable distributive justice to be given a central place in the development of rural (not merely agricultural) economy, but rural economy and reform alone, found strong support from the Supreme Court in *Vajravelu* v. *Special Deputy Collector*[34] where a law authorising compulsory acquisition of land for the purpose of slum clearance or other public purpose was held to be outside the scope of that article and to attract the provisions of article 31 (2) requiring payment of compensation. On this point the court followed its earlier decision in *Kochuni* v. *State of Madras.*[35] It may be argued that article 31A is drawn in general terms and that there is no mention therein of rural development or rural reform. It might therefore seem somewhat artificial to confine the scope of this provision in the way sought by the court. However, it has always been understood that bringing about rural reforms and agricultural revolution was one of the main planks of the independence movement, and in the Constituent Assembly and in Parliament, while articles 31A and 31B were introduced, it was so understood. Accordingly, the text of the Constitution may not provide sufficient guide to the real meaning of the provision.[36] This is consistent with the fact that the court has taken a liberal and wide view of the power of the state in relation to the terms "estate" and "rights" in article 31A so as to protect, against any challenge (*e.g.*, in regard to non-payment of compensation for acquisition, extinguishment, *etc.*, of the estate or rights in such estate) in the courts, state action in such regard, *e.g.*, consolidation of holdings of land, in the interest of agricultural reforms and rural economic planning.

(2) *Economic Planning and Socialism era*—The Supreme Court seemed to overlook the entire scheme of the property provisions of the Constitution which was to enable the State in India, *inter alia,* to effect not only land reforms as efficiently as possible with a view to remedying the centuries-old injustices perpetrated by the landlords on the tillers of the soil in a country where 90 per cent of the population depends for its livelihood on agriculture and rural (cottage) industries, *i.e.* on land, but also social and economic planning generally. Such a change could not practically have been carried out unless it took into account the vast size of the problem and the financial means of the State in a very poor country, aspects which were in the forefront of the minds of the makers of the Constitution who were also fathers of the national independence movement and as such acutely conscious of the need for redistribution of the economic resources in the country. And yet the court took a textual and formal view of the Constitution when *State of West Bengal* v. *Bela Banerjee*[37] came up for its consideration. This case involved the validity of a law providing for acquisition of land for public purpose but limiting the amount of compensation to the market value of the land on a certain date in the past. The court held that the consti-

tutional requirement of compensation meant "a just equivalent of what the owner has been deprived of" and that determination of the "true value" of the property acquired was a justiciable issue to be decided by the court.[38] This is a formal view because judicial review of the adequacy or fairness of the amount of compensation was never intended by the makers of the Constitution.

The extent of regulation and compulsory acquisition of property rights, including questions relating to compensation, are primarily a matter for the legislature and the courts in India must learn to live with this fact. Hence came the Fourth Amendment of the Constitution in 1955. This amendment, *inter alia,* provided that no compulsory acquisition law "shall be called in question on the ground that the compensation provided by that law is not adequate"[39] and that transfer of ownership or possession to the State was necessary to constitute acquisition or requisitioning of any property by the State; simple deprivation was not enough.[40] This, however, still left open the question whether the legislature could choose to provide compensation which was nominal or illusory. On a proper view of the matter it seemed such a compensation would not be within the intent of the amendment. Then came the court's decision in *Vajravelu* case,[41] where the court held, strangely, that even after the Fourth Amendment a compulsory acquisition law must provide for "a just equivalent of what the owner has been deprived of".[42] But this was to inquire into the adequacy of the amount of compensation, which was expressly forbidden by the amendment. The court, however, *appeared* to be right, in theory, in holding that provision of a nominal or illusory compensation amounted to a fraud of powers. But in fact the line between nominal compensation and inadequate compensation is not easy to draw in practice. And who is finally to draw this line? The courts? Or the legislature? This point was never considered by the court in this case. The plain intention of the amendment was to exclude judicial review on the question of adequacy of compensation: *The constitutional principle, 'what cannot be done directly cannot be done indirectly,*[43] *applies as much to the courts as it does to the legislature.* However, the court, significantly, accepted later the point that a compensation determined on the basis of market value prevailing on a date anterior to the date of extinction of interest was still determined on a principle specified, *i.e.,* it did not hold (as it could have done) that such a principle was 'irrelevant'.[44] Equally, the court recognised that the amount of compensation, if fixed by the legislature, was not justiciable, "because the challenge in such a case, apart from a plea of abuse of legislative power, would be only a challenge to the adequacy of compensation".[45] This still left open the possibility of judicial review on grounds of 'relevance' of the specified principles of compensation.

Shortly thereafter, demands of distributive justice received a severe set-back by the decision in the *Bank Nationalization* case[46] (Ray J. dissenting) where the court seemed to divorce itself from the redistributive philosophy of the Constitution. The case was concerned with the validity of a law purporting to authorise the State to take over ('nationalize') 14 specified banks. This law was challenged as being in conflict with the compensation requirement. Once again, the judges undertook upon themselves the dubious and impracticable task of determining whether the compensation provided for was 'illusory', whether the principles specified by the legislature were 'relevant'[47] or 'appropriate',[48] and whether the compensation provided for was "an equivalent in money of the property compulsorily acquired",[49] without realising that this in fact involved consideration of the question of adequacy of compensation. The judges even went on to specify what the 'appropriate' methods or principles of determining compensation were and how compensation should be calculated.[50] In the face of the Fourth Amendment, how could a court say that the specified principles were not relevant to the determination of a fair or just equivalent of the property acquired? And yet, as Ray J. pointed out,[51] this is what the majority did. The most the court could do was to see whether the principles were *prima facie* relevant to the determination of compensation as distinct from adequacy of compensation.[52] But even here the redistributive objectives of the Constitution require that the judgment of the legislature must be greatly trusted, recognising that the line between some compensation and inadequate compensation is finally to be drawn by the legislature and not by the courts. Thus, if it is suggested that no compensation has been laid down for a particular asset, such a suggestion goes to questioning the adequacy of the compensation: no such suggestion is valid so long as compensation has been provided for the entire undertaking and such compensation cannot be judicially questioned so long as the principles for determining it have been laid down by the legislature.

To reverse the plainly inequitable and unjust consequences for and moral affront to the poor man for the improvement of whose lot the Father of the Nation and the founders of the Constitution had fought so hard — a constitutional fact the judiciary is entitled and indeed bound to take judicial notice of — the Twenty-fifth Amendment to the Constitution was passed by Parliament in its constituent capacity in 1971. The idea was to protect the dignity of the poor man, whether in urban or in rural India, who had no property worth speaking of which could be protected by the Constitution. This amendment amended article 31(2) so as to provide that a compulsory acquisition law fixing an "amount" or specifying certain "principles" determining such amount "shall not be questioned in any court on the ground that the amount so fixed or determined is not adequate or that the whole or part of such amount is to be given otherwise than in cash". This presumably left open the possibility of judicial review, for judges (as in the *Bank Nationalization* case) who are literal constructionists and who would interpret the Constitution as if it were a statutory enactment, on the ground that the "principles" laid down by a law were arbitrary or irrelevant or irrational so that they could not really be described as principles! That is, some judges would go to any lengths to defeat any 'ouster' clause even in a constitution.[53] But, in any case, it is significant that in the new article 31 (2) there was no mention of 'compensation'; only the word 'amount' was inserted. No longer was it possible to rely on the 'illusory *compensation*' argument.

However, Indian judicial attitudes formed in the common law tradition often tend to harden in the face of 'ouster clauses' and at the same time to retreat into some safe, *albeit* artificial, haven of formal or grammatical view of a constitution influenced by the 'rationality' of the 'reasonable' man in a Western capitalist society. This was shown by the attitude of the majority of the Supreme Court judges in *Kesavananda* v. *State of Kerala*,[54] where Sikri C.J. emphasized that even the "amount" must be fixed according to some "principles" which could not fix the amount "arbitrarily".[55] The ghost of 'illusory' compensation thus haunted the court. Indeed, the Chief Justice went so far as to hold that provision of "arbitrary or illusory or a grossly low amount" was outside the amending power of Parliament under article 368, basing his view on the standard of "the judicial conscience" and "the conscience of every reasonable human being",[56] a variant of the Western natural law tradition. The 'relevance', 'reasonableness' or 'rationality' of the principles and of the amount fixed thus, again, became a matter to be finally determined by the courts, despite the Twenty-fifth Amendment.

(3) *Emergency and post-Emergency era*—An even more significant case after this amendment was *State of Karnataka* v. *Ranganatha Reddy*[57] in 1977 where the validity of a law nationalizing motor transport in the state of Karnataka was in issue. Though the law was held valid by all the seven judges of the Supreme Court, the divergence between the 'majority', led by Untwalia J., and the 'minority', led by Krishna Iyer J., represented the difference between a literal constructionist or formal approach and a goal-oriented, teleological approach. The first, not surprisingly, held that even after the Twenty-fifth Amendment the "amount" payable or the principles laid down by a law could be reviewed by the courts to see whether they were not "wholly arbitrary or illusory",[58] leaving one wondering what language a constituent body such as Parliament would have to employ in order to make the legislature final arbiter

on questions such as payment of an 'amount' for property acquisition or making the Directive Principles superior to Fundamental Rights. The second, in line with the thesis argued for in this paper, emphasized, rightly, judicial creativity inspired by a "feeling" of the philosophy and "sharing" of the foresight of the founding fathers of the Constitution,[59] and the "social-spiritual thrust" of their "dynamic faith",[60] which in sum could be regarded as concerned with achieving 'social justice' implicit in the Preamble of the Socialist Republic and in article 39(b) and (c): Justice Krishna Iyer, laying emphasis on this article and its "social mission" and on nationalization as a "distributive process for the good of the community",[61] argued that the dynamics of development must inform interpretation in this area.[62] The point made here earlier, 'what cannot be done directly cannot be done indirectly', was thus affirmed by him in criticising the decision of the High Court below: "The (High) Court will not question 'adequacy' directly, but 'interpret' the amended article [i.e., article 31(2) as amended by that amendment] into the same desideratum."[63] Perhaps the point can be best made in the words of Dhavan and Nahar: "Where does exactly the concept of 'inadequacy' stop and the concept of 'illusoriness' begin?"[64] To this could be added: 'Who is finally to draw this line? The courts? Or the legislature?' They accordingly interpret Justice Krishna Iyer's approach as resting on his view that "many governmental programmes designed by the government are consistent with the socialist goals of the Constitution".[65] But even he, a great judge by any standard, while considering the validity of a law enacted before the aforesaid amendment, proceeded along with other judges of the Supreme Court in 1980 on the assumption that it was for the courts finally to draw the line between 'illusory' compensation and 'inadequate' compensation and to consider the 'relevancy' and 'rationality' of the principles for determining compensation.[66] Lingering doubts on the compensation issue were also shown by the court's two decisions in 1979.[67]

Finally, in the *Minerva Mills'* case,[68] decided in 1980, the Supreme Court held that the Forty-second Amendment of the Constitution seeking to exclude judicial review of a law, carrying into effect provisions of the Directive Principles, on the ground of conflict with the Fundamental Rights under article 14 (equality before the law) or article 19 (rights of free speech, expression, movement, association, property, trade, business, profession, occupation, *etc.*) was beyond the amending power of Parliament under article 368 because it damaged the basic or essential features of the Constitution, for Fundamental Rights were 'transcendental', 'inalienable' or 'primordial'.[69] The impact of the American Declaration of Independence, the French Declaration of Rights and the Blackstonian natural law treating property rights as sacred can thus be seen in its full vigour in India in 1980, though the court may have been right on the nature of the amending power. Bhagwati J. in his dissenting opinion, however, held, rightly, that the Directive Principles were not inferior or subordinate to the Fundamental Rights and that they occupied "a very high place" in the constitutional scheme but that it was for the court to determine whether the object of the impugned legislation was to give effect to the Directive Principles.[70] But the last point may indirectly bring in the doctrine of 'colourable legislation' or the doctrine of 'pith and substance' in a spirit of confrontation, as distinct from constructive partnership with the legislature. This could be in conflict with the role intended for the court under the philosophy of the Constitution, a point grasped firmly and applied pioneeringly by Justice Gajendragadkar and later, imaginatively, *albeit* in varying degrees, by Justices Krishna Iyer and Bhagwati in their many judgments.

What should the judges do?

Having considered the compensation issue and related questions in the area of distributive justice and the way the Supreme Court has treated them, it is appropriate to consider the various alternative courses theoretically open to the judges and to identify the one best suited for a developing country such as India. Should they align themselves with the government of the day? Should they uphold the doctrine of eminent domain and thus require the government to pay full compensation, at market value, for any property acquired in the context of a redistributive scheme? Should they recognise or uphold some other form of legal reality? Should they assist powerful litigants to use the courts? Finally, should they become part of the process (as might be argued) of symbolism and rhetoric based on the historical philosophy of the Constitution?

The answers to these questions must have been obvious from the preceding paragraphs in this paper and hence an attempt will be made only to indicate the right lines of approach. There is little place for the doctrine of eminent domain in the American sense in a developing country where vast schemes of social and economic reform have to be undertaken for the benefit of the poor and where it is simply beyond the financial means of the government to pay 'compensation' at full market rates. Other similar forms of legal reality are open to the same objection. Thus Blackstonian natural law view treating ownership or possession of property sanctimoniously on the basis of 'sanctity of property', Shakespearian view, upheld in the *Dalziel* case[71] in Australia, deeming property as fully compensable as sanctimoniously necessary for living, and Renner's or Kruse's similar view of property based on the philosophy of law as 'socially neutral' towards private property,[72] all suffer from the same objection. Nor could in such a country powerful litigants be allowed to determine judicial policy to the detriment of the weak, the oppressed and the poor for whom alone constitutional law and the machinery of justice exist. To say this is not to say that the judges should align themselves with the government of the day as a matter of course. They should act in constructive partnership with the government simply because it would be inconsistent with the philosophy of public law in such country to engage into confrontation with the government. Such country cannot afford the destructive luxury of the kind the United States could do when the federal Supreme Court invalidated President Roosevelt's New Deal legislation seeking to introduce ambitious schemes of social welfare and to fulfil the common man's aspirations for a just society.[73] The only occasion where confrontation may be justified in a creative sense is represented by a situation where the government plainly abdicates its duty to promote the welfare of the people through distributive justice and instead engages into a policy of positively undermining the foundations of public law by acting in breach of (say) any Directive Principle[74] or the guarantee of equality before the law. Such a situation, illustrated by the Supreme Court's decision in *Brown* v. *Board of Education*,[75] is a rare occurrence in a developing country where the basis of constructive partnership loses its very soul or the partnership becomes devoid of its rationale. The concept of partnership gains its vitality in matters of distributive justice in India from the need to trust the judgment of the legislature as regards payment of the amount (which is not intended as compensation in the Western sense) for the property acquired. This is because the socio-economic background and the context of the Constitution require that large private holdings of private property be considered incompatible with the needs of the situation demanding redistribution in the interest of social justice and equality. The profit which the expropriated owner has already derived, the nature and importance of the purpose for which the property is to be acquired, the nature of the property itself and its value in the overall economic planning and development schemes, the number of persons affected and benefited, and sometimes even international conditions, are all matters best left for the judgment of the legislature, and not for the judges' opinions. For this reason the judges ought to be concerned with how best the policy behind a law can be ascertained and whether such policy conforms to those demands.[76] Justice Hidayatullah (as he then was) was thus right to insist that socialism and democracy are not incompatible, though prosperity and social welfare must go hand in hand with controls, and that the courts must reconcile the demands of a welfare state with the rule of law (respect for the individual's rights or interference with such rights only with the authority of the law).[77] But such reconciliation must, again, be viewed in the context of those demands of distributive justice. Here the point simply needs to be made that the Directive Principles, which constitute the core of the philosophy of Indian constitutional law, are not inferior or subordinate — indeed, they are superior — to the Fundamental Rights and that they are binding on the state in India.[78] It is time that the judges in India once and for all accepted that these Directives together with the Preamble envisaging social and economic justice in the socialist republic require them to be creative in the tradition of Holmes, Brandeis, Warren, Black and Denning and not to be mere 'law finders' in the Frankfurter tradition of narrow grammatical world of statutory interpretation with its obsession with the meaning of words and with its indifference to the meaning of meaning.

This brings me to the *raison d'etre* of the Directive Principles and the Preamble, read with article 31C, which is to give a real meaning and content to the Fundamental Rights. Of what value is the right of property to a person who has no property worth speaking of, which could be protected constitutionally? Of what value is the right of free speech or expression or, indeed, any other fundamental right, to a person who happens to be so poor that he does not know when and where he will have his next meal, *i.e.,* who does not have adequate means of livelihood envisaged by article 39(a) of the Constitution? Should not therefore need rather than concentration of wealth and power be the guiding criterion in the search for distributive justice, so strongly championed by Justices Krishna Iyer and Bhagwati in their judgments? Should not the Supreme Court now begin to turn itself into the *Indian* Supreme Court in the sense of seeking to acquire the respect of real India which consists of people living amidst grinding poverty, malnutrition, hunger, illness, disease, extremes of climate and gross inequalities in the distribution of economic resources?

It could be argued that to engage into such rhetorical expression and rhetorical questions is to become emotive and to reject cold logic and objectivity. The point needs to be emphasized, however, that rhetoric and symbolism do represent social reality on which any legal reality must be based and this brings out the real philosophical problem surrounding the concepts of freedom and justice. They represent social reality because they are part and parcel of the ordinary citizen's thought process in India, similar to the situation in the United States, as Gusfield and Carson have clearly shown,[79] and these are often the only means by which he can express himself. Indeed, this was often the language used by the leadership of the national independence movement and by the participants in the Constituent Assembly debates. This means that the judges and scholars are expected to identify themselves with the ordinary citizen and place themselves 'into his shoes' (if he has any). If the cold logician and objective observer still views rhetoric and symbolism in a condemned and sarcastic sense, how else (I venture to put it rhetorically) is a judge to interpret the real needs, let alone the mode of thought, feelings, aspirations and expectations, of the citizen for whom alone any system of constitutional law, with its utmost emphasis on distributive justice, must exist? To condemn rhetoric and symbolism is to condemn him and to lay down an arbitrary law, divorced from his situation, for him. Even if the law is broken, symbolism makes it clear whose law it was and whose knowledge and interpretation of the system was publicly endorsed by the legislative act.[80] And in any case, behind such rhetorical questions lies the deep-seated social reality of absolute poverty for hundreds of millions with all the consequences that this involves. It is a recognition of this cold reality which enables and indeed requires the judges to place the Directive Principles on a higher level than the Fundamental Rights. In such situation 'cold logic' and 'objectivity' become a mere hobby horse for those who wish to engage in polemics or in abstract intellectual exercises.

Finally, the role of the judges is tied in with the philosophy of the Constitution as evident from the presumed intention of the makers of the Constitution ascertained from a variety of legitimate sources, including the history of the national independence movement. On this view too much certainty and precision should not be expected from the Constituent Assembly debates by way of specific answers to specific questions. To expect from the participants and non-participants in those debates a degree of precision unwarranted by the then standards of expression in the intellectual milieu of the second quarter of this century and in the face of the major national crisis created by the partition of the country and by unprecedented communal slaughter on a massive scale, is to engage into some fantasy or pipe-dream of an arm-chair intellectual. On the other hand it is philosophy which is richly immanent and enduring and which should give a much clearer understanding of the thinking of the founding fathers on specific issues. This shows that while legal and constitutional sociology of one generation can and often does give a misleading picture of what the reality is for the next generation, legal and constitutional philosophy lasts throughout the ages and gives a much more illuminating guide to successive generations as to the direction in which they should move.

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45. *Id.* at 650.
46. *R. C. Cooper* v. *Union of India*, A.I.R. 1970 S.C. 564.
47. *Id.* at 607.
48. *Id.* at 609.
49. *Id.* at 614.
50. *Id.* at 609-15.
51. *Id.* at 637-38.
52. But even Ray J. seemed to think that 'relevancy' extends to the 'property acquired' *and* 'the time of acquisition' (at 641).
53. Support for such a view is, ironically, to be found in H. W. R. Wade, *Constitutional Fundamentals* (Hamlyn Lecture), (1980) ch. 5.
54. A.I.R. 1973 S.C. 1461.
55. *Id.* at 1555.
56. *Id.* at 1554.
57. A.I.R. 1978 S.C. 215.
58. *Id.* at 224.
59. *Id.* at 233.
60. *Id.* at 250.
61. *Id.* at 249-50.
62. *Id.* at 239.
63. *Id.* at 243.

64. R. Dhavan and N. S. Nahar, 'The Compensation Conundrum — Socialism at the Bar of the Supreme Court', (1978) 20 *J.I.L.I.* 406, 434.

65. *Id.* at 436.

66. *Ishwari Khetan Sugar Mills* v. *State of U.P.*, A.I.R. 1980 S.C. 1955, 1972-73. This criticism applies despite the fine words of the court: "It would be a day time hallucination to call such principle irrelevant or compensation illusory" (at 1973). See also *Nandlal* v. *State of Haryana*, A.I.R. 1980 S.C. 2097, 2108-09.

67. See *Collector, Rajgarh* v. *Dr. Hari Singh Gaur*, (1979) 1 S.C.C. 236; *Oriental Gas Ltd.* v. *State of West Bengal*, (1979) 1 S.C.C. 175.

68. *Minerva Mills Ltd.* v. *Union of India*, A.I.R. 1980 S.C. 1789.

69. *Id.* at 1806-07, 1811.

70. *Id.* at 1846, 1850, 1852, 1856.

71. *Minister of State for the Army* v. *Dalziel*, (1944) 68 C.L.R. 261.

72. K. Renner, *The Institutions of Private Law and their Social Functions* (1949); V. Kruse, *The Right of Property*, transl. P.T. Federspiel, (1939).

73. *Schechter Poultry Corporation* v. *United States*, (1935) 295 U.S. 495.

74. Justice Bhagwati in *Minerva Mills*, *supra* note 68 held, similarly, that "non-compliance" with the Directive Principles would be "unconstitutional" on the part of the state (at 1849).

75. (1954) 374 U.S. 483.

76. *Cf.*, Mr. Justice Hidayatullah in *Democracy in India and the Judicial Process* (1965) 70-71.

77. *Id.* at 81.

78. J. Narain, 'Equal Protection Guarantee . . . .' at 206-08. For a debate on the binding nature of the Directives, see J. Narain and U. Baxi in (1969) 11 *J.I.L.I.* 245 and 270. See also Bhagwati J. in *Minerva Mills*, *supra* note 68 at 1846-47, 1851.

79. See J. R. Gusfield, *Symbolic Crusade* (1963); W. G. Carson, 'Law Making: Symbolism and Instrumentality', in C. Campbell and P. Wiles (eds.), *Law and Society: Readings in the Sociology of Law*, (1979) 236.

14

POSITIVE DISCRIMINATION IN INDIAN CONSTITUTIONAL LAW FROM *DORAIRAJAN* TO *THOMAS*

ROBERT HARDGRAVE Jnr.

The concept of equality lies at the core of American democratic aspiration. But from the inception of the Republic, the actuality of that value was restricted. Of those imposed inequalities, the most glaring were the laws and practices which relegated racial minorities to inferior status and denied to them equal access to the opportunities enjoyed by others. As these barriers have been dismantled in the pursuit of a more egalitarian society, newly achieved "equality of opportunity" has not been matched by the anticipated equality of result. America remains divided by stark racial inequalities. Genuine equality can be achieved only when the effects of past discrimination have been overcome, and to that end *affirmative action* has been required by executive order and court decree. The attempt to redress inequality has stirred bitter controversy, evoked by such phrases as "reverse discrimination", and has revealed some fundamental, and perhaps ultimately insolvable, dilemmas. Foremost among these is the conflict between individual rights and group interests.

These same dilemmas have confronted India, a vast and heterogeneous nation characterized by the profound inequalities of caste and the degradation of untouchability.[1] The Indian Constitution in its Preface resolves "to secure to all its citizens . . . Equality of status and of opportunity. . . ." Indian citizens are guaranteed, as Fundamental Rights, freedom from discrimination on grounds of religion, race, caste, sex, or place of birth. Untouchability is outlawed, and various articles prohibit discrimination in both private and public spheres.

Simply to "cease and desist" was recognized as insufficient if substantive equality were to be attained. The Constitution in the Directive Principles of State Policy stipulates that:

> The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect then from social injustice and all forms of exploitation.[2]

Various measures within the Indian Constitution provide exceptions to the general principle of non-discrimination so as to secure special preference for depressed and backward classes — a policy for ameliorating group differences employed by the British in India from the late nineteenth century. Broadly termed "protective discrimination,"[3] its use, as Marc Galanter notes, "was envisaged as an exceptional and temporary measure to be used only for the purpose of mitigating the inequalities between communities and [was] designed to disappear with these inequalities."[4] The inequalities have not disappeared, nor have the preferences. Once these benefits had been secured, they were not to be easily given up. Quotas were solidified and extended as there developed a "vested interest" in backwardness. Against such policies and programmes, individuals asked to bear the cost of redressing group inequalities sought relief in that protection guaranteed by the Constitution.

The first of a number of important cases over the past 30 years of India's independence, *Smt. Champakam Dorairajan* v. *State of Madras*, and its companion, *C. R. Srinivasan* v. *State of Madras*,[5] raised the issues with which the Indian courts have continued to grapple. Arising soon after the promulgation of the new Constitution in 1950, the two cases involved challenges to the use of caste and religions quotas in university admissions. The plaintiffs argued that the quotas, established by government order, violated their Fundamental Rights[6] as guaranteed by articles 15(1) and 29(2) of the Indian Constitution. Article 15(1), on the "Right to Equality", reads:

> The State shall not discriminate against any citizen on grounds, only of religion, race, caste, sex, place of birth or any of them.

Guaranteeing "Cultural and Educational Rights", article 29(2) reads:

> No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State Funds on grounds only of religion, race, caste, language or any of them.

Mrs. Dorairajan and Srinivasan were both Brahmins, members of the highest caste in India. Although numbering only about 3 per cent of the population of Madras State, the Brahmins, during the period of British rule, had used their traditionally high status as a stepping stone to dominance within political life, government service, and the institutions of higher education. Indeed, before 1920, the University of Madras was an almost wholly Brahmin institution. In 1918, for example, 70 per cent of the degrees awarded went to Brahmins.[7]

The British had long been sensitive to the problem of Brahmin dominance. As early as 1854, British administrators in Madras had been ordered to divide subordinate appointments among the principal castes so as to achieve a more balanced representation.[8] It was not until the organization of the Justice Party in 1916, however, that the non-Brahmins directly challenged Brahmin preeminance. From 1920, when it took power in Madras, the Justice Party sought to secure more adequate representation for non-Brahmins in all areas of public life. Where "gross inequalities" existed, one Justice leader declared, "preference shall be given to competent candidates from the communities which are affected until the inequalities are removed."[9] The policy was formalized for the government services in the Government Order of 1922, providing specific quotas for the various communities in rough relationship to their presence within the general population.

The policy of reservation under the "Communal G.O." was subsequently extended to the area of university admissions, and it was this that Dorairajan and Srinivasan challenged on the basis of equal protection as guaranteed by the new constitution. Mrs. Dorairajan, in seeking admission to the Madras Medical College, and Srinivasan, to the Engineering College, confronted an admissions policy explicitly designed "to protect the weaker sections of the people and to provide opportunities to all" by requiring that the limited number of places available be apportioned on the basis of caste and religion. While the allotment provided for some discretion and included a special reservation for students from out of state, admissions were made for four regions within the state, in which for every 14 seats available, non-Brahmin Hindus were reserved 6 positions, backward Hindu communities, 2; Brahmins, 2; Harijans (untouchables), 2; Anglo-Indians and Indian Christians, 1; and Muslims, 1.[10]

While the Brahmin quota was higher than their numbers within the general population would have suggested, the fact that a disproportionately high percentage of applicants were Brahmins (most of whom had superior credentials to non-Brahmin applicants) meant that the policy, in effect, was against Brahmins. The problem was that if a policy of preferential admissions was not employed, Brahmins would again be dominant. In the case of the Engineering College, for example, selection on the basis of "marks" alone would have resulted in Brahmins securing 249 of the 395 seats. Only 3 Muslims would have been selected, and no untouchables would have been admitted.

The State admitted that given their relatively high marks, both Dorairajan and Srinivasan would have been admitted had they not been Brahmins. But they were not excluded, *per se*, because they were Brahmins. Arguing for the State of Madras, Advocate-General Alladi Krishnaswami Ayyar (himself a Brahmin) contended that the impugned Government order would be constitutionally invalid only if a person were totally excluded on the basis of race, religion, or caste — a situation analogous to that in the American South where blacks were denied admission solely on the basis of race.

The State argued that the order requiring preferential admissions by quota was upheld by the mandate conferred in article 46 of the Directive Principles of State Policy in the Constitution:

> The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.[11]

The State argued, moreover, that it had the sole discretion to decide who were to be classed among "the weaker sections of the people".

In separate opinions generously citing American constitutional precedent, the Madras High Court unanimously held for Dorairajan and Srinivasan. The Chief Justice affirmed the responsibility of the State for the uplift of the backward and weaker classes of the people. But, he contended, the Constitution is specific in the exceptions it provides to the general principle of non-discrimination.[12] With respect to public employment, for example, article 16(1) reiterates the principles:

> There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Article 16(4) provides an exception:

> Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

No exception is offered with regard to admission to educational institutions.

In an opinion graced by an elegance of style, Justice Viswanatha Sastri, another Brahmin, considered the injustice imposed by the admissions quota:

> By its allotment of a fixed number of seats to students of a particular caste or community, the Communal G.O. denies equal treatment for all citizens under like circumstances and conditions, within the privileges conferred and disabilities imposed.

Sastri recognized that in determining admissions for the limited number of places available, some criteria must be used, but should be "reasonably relevant" and "the qualifications prescribed must be the same for all citizens." "The rights that are protected and guaranteed by [article 15(1)] are the personal rights of each individual citizen", not group rights. Each person has a right to be considered as an individual, without regard to his race, religion, or caste.

> It would be strange, if in this land of equality and liberty, a class of citizens should be constrained to wear the badge of inferiority because, forsooth, they have a greater aptitude for certain type of education than other classes. It would ever be unjust — it is now unconstitutional — to deprive deserving youths of a particular community of a right for no sin or fault of theirs and for no other reason than that they belong to a particular caste or religion.

Upholding the decision of the Madras court, the Indian Supreme Court ruled that the admissions quota as required by the Communal G.O. violated the Fundamental Rights guaranteed by articles 15(1) and 29(2) and was thus clearly unconstitutional.[13]

Within two months of the *Dorairajan* decision, the Indian Parliament passed the First Amendment to the Constitution. To article 15, clause (4) was added:

> Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

On challenge it fell to the courts to interpret the scope and meaning of article 15(4). In a series of cases, the Supreme Court has sought to define the limits of protective discrimination and to shape a doctrine of equality under the Indian Constitution.

In a case arising in 1958 in the State of Andhra, it was established that any scheme of preference must be administered so as to operate *in favour* of the backward class. Quotas were to be taken as guaranteeing a minimum number of positions reserved and not as imposing a ceiling on admissions for the designated group.[14] Another Andhra case, however, stipulated that the reservation for backward classes was not to be transformed into a guarantee of seats *over and above* those obtained by merit.[15] Both cases concerned medical college admissions, but the principles were applied by subsequent court decisions to other areas of protective discrimination, notably in legislative representation[16] and in the reservation of government posts.

The extent of preferences permitted was among the most pressing issues. The Constitution is explicit in regard to the protection of the Scheduled Castes and Tribes, and the Scheduled Castes, as such, were understood to be those suffering the disabilities of untouchable status. But who were the "backward classes" and what criteria might be used in designating those for preferential treatment?[17] The Constitution is vague, and in a nation as poor as India, the category might be expanded to include an actual majority of the population. Questions regarding the determination of backwardness had been raised in *Dorairajan.* Using caste or religious criteria for classification would inevitably involve gross judgments about the level of particular group's advancement, but even within the more backward communities, certain elements or individuals might be highly advanced. Were they to receive the benefit of preference? Similarly, among the higher castes, even the Brahmins, were to be found those who could only be regarded as educationally, socially, and economically backward. Were they, simply because of their caste, to be denied benefit?

By whatever criteria backwardness might be determined, caste or otherwise, fundamental problems remained, for as Galanter states, "Backwardness is not a single trait; it exists in kinds and degrees". By whatever standards employed, some are more backward than others. "A single uncompartmentalized reservation for all the backward classes [would] reproduce within that group the same kind of unfairness that protective discrimination is designed to eliminate." Without special protection for the *most* backward, competition would, in effect, "give the least benefit to those with greatest need".[18] But the danger here is in a rococo proliferation of categories.

Further questions were simply how many might be given preference? And to what extent? Would a reservation be limited so as to correspond roughly with the percentage of the group in the overall population? If so, did this impose a similar limit on yearly admissions, or, alternatively, did it permit a much larger reservation until such time as proportional representation is reached?

A series of cases in Mysore confronted the problem of determining "backwardness" and the limits on the percentage of the population designated for preferential treatment under article 15 (4). In *Balaji* v. *State of Mysore,*[19] the reservation of 68 per cent of the available seats in the medical and engineering colleges for "backward" communities was challenged. The classification had been solely on the basis of caste and in such a manner as to exclude, principally, Brahmins.

By government order, after four previous orders had been struck down by the court, Mysore fixed admission quotas so as to reserve 15 per cent of the seats for Scheduled Castes, 3 per cent for Scheduled Tribes and 50 per cent for other backward classes, out of which 28 per cent was reserved bor "backward classes" and 22 per cent for "more backward classes".

The Backward Classes Commission has interpreted the term "classes" as relating primarily to the social hierarchy based upon caste,[20] but the chairman prefaced the Commission's Report with a statement of profound doubt. As witness to an unseemly rivalry among castes for "backward" designation, he concluded "that the remedies we suggested were worse than the evils we were out to combat". "Once we eschew the principle of caste, it would be possible to help the extremely poor and deserving from all communities."[21] There was concern, as well, that in the recognition of specific castes as backward, existing distinctions based upon caste would be perpetuated. The matter remained unresolved at the centre, and it was left to the separate states to make a final determination. Mysore proceeded on the assumption that "the low social position of any community is . . . mainly due to the caste system . . . [S]ocial backwardness depends substantially on the caste to which the community belongs, though it recognized that economic condition may be a contributing factor". Caste status alone then would be the criterion of inclusion and exclusion.

In its judgment in *Balaji,* the Supreme Court stated that article 15 (4) refers to "classes of citizens", not to castes, and while "the caste of a group of citizens may be relevant its importance should not be exaggerated". Caste cannot be the sole or dominant test. Backwardness must be both social *and* educational, and while its sources are complex, it is ultimately the result of poverty. The court also held that the classification of "backward" and "more backward" is neither justified nor warranted by article 15 (4) and that, generally speaking, special provisions should be less than 50 per cent. Decline in quality, the court contended, is the "inevitable consequence of reservation", and the interests of the nation would be seriously jeopardized if special provisions for the backward were not held within "reasonable limits".

> The adjustment of . . . competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4).

The court cautioned that in looking after the advancement of the backward classes,

> The State would not be justified in ignoring altogether the advancement of the rest of society.
> The interests of the weaker sections of society have to be adjusted with the interests of the community as a whole.

In 1968, in *Rajendran* v. *State of Madras*,[22] the Supreme Court again confronted the issue in a challenge to the reservation of seats for backward classes in Madras medical colleges. The petitioners argued that the list of socially and educationally backward classes had been prepared on the sole consideration of caste and hence violated article 15(1), which prohibited discrimination on the ground of caste only.

Since 1906, the government of Madras had maintained a list of backward classes. The main criterion for inclusion was the social and educational backwardness of a caste as based on occupation. As Madras found the members of these castes *as a whole* to be educationally and socially backward, the list was adopted for purposes of article 15(4). The Supreme Court accepted the government's argument and concluded that a caste is also a class of citizens.

The problem in the *Balaji* decision was that while the court conceded that caste might be taken as a *"factor"* in determining backwardness, it could not be taken as the basis for such determination. But what then would be the unit of backwardness, if not caste? Presumably not the individual, however backward, for the court has interpreted the reference in article 15(4) to "classes of citizens" as referring to groups.[23] Although the Madras list had been prepared by caste, the castes included were as a whole educationally and socially backward, and this was judged by the court as consistent with the provisions of article 15. In this and the subsequent case, *State of Andhra Pradesh* v. *Sagar*,[24] the court accepted the use of caste as within the requirements of the Constitution, so long as the educational and social backwardness of the caste has been considered. All members of designated "backward" castes would be potential beneficiaries, and no individual, however backward, outside of those listed castes would be eligible for preferential consideration.[25]

The Indian Supreme Court gave explicit form to its concept of equality in its 1975 decision in *State of Kerala* v. *N. M. Thomas.*[26] Arising out of a challenge to a Kerala government provision of preferential promotions for members of the Scheduled Castes,[27] the case had direct relevance to the broad context of protective discrimination. Chief Justice A. N. Ray, for the court's 5-2 majority, upheld the Kerala preference and invoked the doctrine of *reasonable classification.* A reasonable classification is "one which includes all who are similarly situated and none who are not".

> Discrimination is the essence of classification. Those who are similarly circumstanced are entitled to equal treatment. Equality is among equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributed must bear a just and rational relation to the object sought to be achieved. (para 24)
>
> There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. (para 27)
>
> The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances . . ., but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of condition. Equality does not connote absolute equality. (para 31)
>
> Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens . . . Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reason means rational classification for differential treatment having nexus to the constitutionally permissible object . . . Therefore, differential treatment in standards of selection are within the concept of equality. (para 44)

In a concurring opinion, Justice Mathew argued that because "men are actually born different" justice requires "some sort of proportionate equality". (para 53) "The principle of proportionate equality is attained only when equals are treated equally and unequals unequally." (para 54) Compensatory State action is required to eliminate social and economic inequalities, to make equal what force of circumstances has made unequal.

> Whether there is equality of opportunity can be guaged only by the equality attained in the result. Formal equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity. (para 75)

In an implicit invocation of Kant, Justice Mathew concluded,

> The ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of all human beings and call for a society which provides these conditions of life which men need for development of their varying capacities. It is an assertion of human equality in the sense that it manifests an equal concern for the well being of all men. (para 89)

Justice Krishna Iyer concurred: " 'Equal opportunity' for members of a hierarchial society makes sense only if a strategy [exists] by which the underprivileged have environmental facilities for developing their full human potential." (para 141)

> [I]f a court is convinced that the purpose of a measure using a suspect classification is truly benign, that is, that the measure represents an effort to use the classification as part of a programme designed to achieve an equal position in society for all tribes and groups and communities, then it may be justified in permitting the State to choose the means for doing so, so long as the means chosen are reasonably related to achieving that end. (para 145)

But in affirming the impugned preference for Scheduled Castes and Tribes, Krishna Iyer offered a threefold note of caution on the danger of reservation. (para 124)

First, he contended that the benefits bestowed by protective discrimination "by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak . . .". This is true not only within the backward classes category but among the Scheduled Castes as well. He cites research revealing the emergence of a "dual society" among Harijans, with "a tiny elite gobbling up the benefits".

Second, the claim of backwardness is "overplayed extravagantly in democracy by large and vocal groups". The higher "backward" classes have acquired "a vested interest in the plums of backwardism". With privilege and preference, they compete unfairly with their near-equals in the unprotected category above them, but they deny to the truly disadvantaged the benefits which the Constitution seeks to bestow. For purposes of protective discrimination, backwardness cannot be treated without internal distinctions.

> The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. It we search for such a class, we cannot find any large segment other than the scheduled castes and scheduled tribes. Any other *caste,* securing exemption from article 16(1) and (2), by exerting political pressure or other influence will run the high risk of unconstitutional discrimination . . . [C]asteism cannot come back by the back door and, except in exceptionally rare cases, no class other than harijans can jump the gauntlet of 'equal opportunity' guarantee. (para 143)

Third, Krishna Iyer was convinced that "a lasting solution" to the problem of backwardness in India will come only from fundamental improvements in the social environment and, ultimately, in the breakdown of caste barriers through intermarriage.

He concluded with admonition that:

> No caste, however seemingly backward, or claiming to be derelict, can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens . . . The heady upper berth occupants from "backward" classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the needbased bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers. The constitutional *dharma,* however, is not an unending deification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exercising of the social evil and gradual withdrawal of artificial crutches. (para 149)

The policy of protective discrimination assumes a strong correlation between the ascribed status of a caste and the social, economic, and educational level "achieved" by its members. The structure of benefits rests on the assumption "that the most polluted castes contain the most destitute people, the least educated, the weakest and most dependent politically".[28] While never perfectly congruent in the past, an individual's position in the ritual hierarchy, as determined by caste, was closely tied to his secular socio-economic status. They were interdependent and mutually reinforcing. So long as the old correlation held, it perhaps made little difference if those most in need of protection and advancement were listed for benefit by caste. "It begins to matter very much as the correlation starts breaking down, and this", Lelah Duskin finds in her perceptive analysis of the backward classes, "is what is happening today".[29] As a caste becomes increasingly differentiated in social, economic, and educational terms, "the practical difficulties of caste as the unit for granting or withdrawing concessions will also increase".

> One of the basic paradoxes of the special treatment policy is that it is designed to break down the correlation on which it is based and that it becomes unfair precisely as it becomes successful . . . No doubt the Harijans as a whole are more underprivileged than any other group of comparable size. But there are more and more Harijan families who are better off than some non-Harijan, and more and more objection is being voiced to the policy of giving them special help when there are others who need it more and cannot get it because they were not born into the right castes.[30]

The dilemma or protective discrimination is that by the very use of racial, ethnic, and caste criteria these distinctions may be perpetuated and endowed with a vested interest in their own survival. Fundamental is the inherent contradiction between individual rights and group categorization. The problem is evident in the conflict between "unprotected" individuals outside of a designated beneficiary group and those within the group itself. But at another level, categorization affects the individual rights of those within the group—specifically those for whom special benefits are most needed. The aspiration for substantive equality may indeed be undermined by the submersion of the individual within group categories.

REFERENCES

1. Among the best books on untouchability is J. Michael Mahar, ed., *The Untouchables in Contemporary India* (1972). In this collection of essays, that by Lelah Dushkin, "Scheduled Caste Politics", is especially noteworthy. Also see, Harold R. Issacs, *India's Ex-Untouchables* (1964) and Owen M. Lynch, *The Politics of Untouchability* (1969). See Eleanor Zelhot's extensive bibliography on untouchability at the end of the Mahar volume, 431-81.

2. Article 46. The term "Scheduled Caste" was first used in the Government of India Act of 1935 for those depressed Hindu castes listed for purposes of statutory safeguards and special benefits. The term is often used synonymously with "untouchable" and "Harijan" (the term Gandhi offered meaning "child of God"). According to the 1971 census, the various castes so identified number approximately 80 million—roughly 15 per cent of India's population. The term "Scheduled Tribe" refers to those tribal peoples singled out for protection and preferential treatment. They number some 5 per cent of the population.
3. The phrase "protective discrimination" has gained wide currency in India. The term was used by C. H. Alexandrowicz in *Constitutional Developments in India* (1957) 56, but its usage today is properly associated with Marc Galanter, whose work on protective discrimination in India constitutes a major contribution to the study of law and society. See Marc Galanter, "Equality and Protective Discrimination in India", (1961) XVI *Rutgers Law Review* 42-74; "Law and Caste in Modern India", (1963) III *Asian Survey*, 544-59; "Equality and Preferential Treatment: Constitutional Limits and Judicial Control", (1965) XIV *Indian Yearbook of International Affairs*, 257-280; "The Problem of Group Membership: Some Reflections on the Judicial View of Indian Society", in Reinhard Benedix and Seymour Martin Lipset, eds., *Class, Status, and Power* (1966) 628-40; "Changing Legal Conceptions of Caste", in Milton Singer and Bernard S. Cohn, eds., *Structure and Change in Indian Society* (1968) 299-336; "Group Preferences and Group Membership in India", (1967) II *Journal of Asian and African Studies*, 91-124; "The Abolition of Disabilities: Untouchability and the Law", in Mahar, *supra* note 1 at 227-314.
4. Galanter, "Equality and 'Protective Discrimination' in India", id. at 45.
5. *Smt. Champakam Dorairajan* v. *State of Madras*, C.M.P. No. 5255 of 1960 and *C. R. Srinivasan* v. *State of Madras*, C.M.P. No. 5340 of 1950, in the High Court of Judicature at Madras, July 27, 1950. A single judgement was delivered in the two cases. I am grateful to M. Raja, Assistant Registrar, the High Court of Madras, for providing me with a typescript of the Judgment and for his insightful comments on the case. The Indian Supreme Court also handled the two cases in a single judgement. *State of Madras* v. *Smt. Champakam Dorairajan*, A.I.R. 1951 S.C. 226.
6. For a discussion of the Fundamental Rights section, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966) 50-115, and M. V. Pylee, *Constitutional Government in India* (2nd ed., 1965) 187-341.
7. S. Saraswathi, *Minorities in Madras State: Group Interests in Modern Politics* (1974) 49. Also see Eugene F. Irschick, *Politics and Social Conflict in South India: The Non-Brahmin Movement and Tamil Separatism, 1916-1929*, (1969) 1-26.
8. S. Saraswathi, *id.* at 54.
9. T. A. Ramalingam Chettiar in the Madras Legislative Council, quoted in Saraswathi, at 89. Both Saraswathi and Irschick provide a broad analyses of the Non-Brahmin Movement in general. Also see Robert L. Hardgrave, Jr., *The Dravidian Movement* (1965).
10. An additional provision was made for medical colleges that not less than 20 per cent of the seats available be filled by women from each region.
11. The articles of the Directive Principles are not enforceable by any court but are nevertheless fundamental in the governance of the country, and it is obligatory on the part of the State to apply these principles in mak-

ing law. The issue of primacy between the Fundamental Rights and the Directive Principles had, since *Dorairajan*, been decided by the court in favour of the Fundamental Rights. In 1973, however, the court gave preeminence to article 46. In its ruling in *Keshavananda Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1941, the court said that the collective Directive Principles must be *read into* the individual Fundamental Rights.

12. In providing for the safeguard and uplift of the backward classes, the Constitution contains a number of special provisions; 16(4), cited in the text, and the various articles of Pt. XVI, notably 335, 336, 337, and 340. For a discussion of these provisions, see Pylee, *supra* note 6 at 747-59.
13. A.I.R. 1951 S.C. 226. The decision was delivered on April 9, 1951.
14. *Raghuramulu* v. *State of Andhra Pradesh*, A.I.R. 1958 A.P. 129. In his review of the judgment in the case, Galanter notes that the court ruled that "Article 15(4) authorized the abridgement of fundamental rights in order to make special provision for backward classes but could not be used to abridge the rights of backward classes. Thus, if backward classes secure more seats by merit than are reserved for them, the reservation cannot be used to limit them to a prescribed number". "Equality and 'Protective Discrimination' in India", *supra* note 3 at 48.
15. *Puppala Sudarsan* v. *State of Andhra Pradesh*, A.I.R. 1958 A.P. 569, discussed in Galanter, "Equality and 'Protective Discrimination' in India", *id.* at 49.
16. Marc Galanter assesses India's 30 year experience with reserved seats in legislatures in "Compensatory Discrimination in Political Representation", (1979) XIV *E.P.W.* 437-53.
17. For a discussion of "The Backward Classes", see the series of articles by Lelah Dushkin in (1961) XIII *Economic Weekly* 1665-68, 1695-1706, 1729-38; André Béteille, "The Future of the Backward Classes", in Philip Mason, ed., *India and Ceylon: Unity and Diversity* (1967) 83-120, and reprinted in Béteille, in *Castes Old and New: Essays in Social Structure and Social Stratification* (1969) 103-45; and Marc Galanter, "Who Are the Other Backward Classes", (1978) XIII *E.P.W.* 1812-28. Also see the detailed discussion on the Scheduled Castes and Backward Classes in Ratna G. Revankar, *The Indian Constitution: A Case Study of Backward Classes* (1971).
18. "Equality and 'Protective Discrimination' in India", *supra* note 3 at 51-52.
19. A.I.R. 1963 S.C. 649. Also see *Chitralekka* v. *State of Mysore*, A.I.R. 1964 S.C. 1823.
20. For a discussion of the controversy relating to the meaning of "classes" within article 15(4), see N. Radhakrishnan, "Units of Social, Economic and Educational Backwardness: Caste and Individual", (1965) 7 *J.I.L.I.* 262-72.
21. Government of India, *Report of the Backward Classes Commission* (Kaka Kalelkar, Chairman) (1956) vii.
22. A.I.R. 1968 S.C. 1012.
23. See Radhakrishnan, *supra* note 20 at 269-70.
24. A.I.R. 1968 S.C. 1379.
25. For an examination of *Balaji, Chitralekha, Rajendra, and Sagar*, see V. Narayanan Nair, "Protective Discrimination—The Supreme Court Retreats?" (1969) *The Supreme Court Journal* (India), 33-42.
26. (1976) 2 S.C.C. 310.
27. A Kerala rule promulgated in 1972 relaxed the requirements for promotion from lower to upper division clerk for members of the Scheduled Castes and Tribes. Promotions based upon seniority-merit were to be

speeded up by exempting them for a period of two years from passing the required test. The grievance was that out of 51 vacancies which arose in the category of upper division clerk in 1972, 34 were filled by members of Scheduled Castes and Tribes who had not met the prescribed qualifications. The remaining 17 seats were filled by others who had passed the requisite examination. Unqualified Harijans had been given preference over qualified non-Harijans, and the petitioner argued that the promotions constituted a violation of articles 16(1) and (2).

28. Lelah Dushkin, "Scheduled Caste Politics", *supra* note 1 at 168.

29. "The Backward Classes", (1961) XIII *Economic Weekly*, 1667. For an analysis of the process of differentiation within a single caste, see Robert L. Hardgrave, Jr., *The Nadars of Tamilnad: The Political Culture of a Community in Change* (1969).

30. Dushkin, "The Backward Classes", (1961) XIII *Economic Weekly*, 1731. Also see Kusum K. Premi, "Educational Opportunities for the Scheduled Castes: Role of Protective Discrimination in Equalisation", (1974) IX *E.P.W.* 1902-10; and Karuna Alumad, "Towards Equality: Consequences of Protective Discrimination", (1978) XIII *E.P.W.* 68-72.

15

SYMBOLIC ACTIVISM: A JUDICIAL ENCOUNTER WITH THE CONTOURS OF INDIA'S COMPENSATORY DISCRIMINATION POLICY

MARC GALANTER

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1. *Pursuing substantive equality: the classic compromise*

In the text of the Constitution, the general principle of compensatory discrimination is established as a Directive Principle, but the specific provisions authorizing it are framed as exceptions to general Fundamental Rights. This arrangement expresses the basic tension between the broad purposes to be achieved and the commitment to confine the device and make it comport with other constitutional commitments, especially that to formal equality.

The exceptional character of compensatory discrimination has frequently been noted by the courts. That article 15(4)† 'has to be read as a proviso or an exception to articles 15(1) and 29(2)' was evident from its history, according to the Supreme Court in *Balaji* v. *State of Mysore.*[1] This has been the received characterization of article 15(4). Thus in *State of Andhra Pradesh* v. *Sagar* the Supreme Court emphasizes that as an exception, article 15(4) cannot be extended so as in effect to destory the guarantee of equality in article 15(1).[2]

In *Devadasan* v. *Union of India* the Supreme Court emphasized that article 16(4) 'is by way of a proviso or an exception' to article 16(1) and 'cannot be so interpreted to nullify or destroy the main provision.' Thus its 'over-riding effect' is only to permit a 'reasonable number of reservations . . . in certain circumstances. That is all.'[3] The characterization as an exception was challenged by Subba Rao, J., dissenting in *Devadasan.* In his view, article 16(4) 'has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.'[4] An extension of this argument was put forward in *C. A. Rajendran* v. *Union of India,* where it was urged that article 16(4) was not merely an exception engrafted on article 16, but was itself a Fundamental Right granted to the Scheduled Castes and Tribes and untrammeled by any other provision of the Constitution.[5] The Supreme Court's response was that article 16(4) imposed no duty on the government to make reservations for these classes but 'Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation . . ."[6]

But if the particular means are discretionary, the object is not: the Constitution explicitly declares it 'the duty of the state' to promote the interests of the 'weaker sections' and to protect them.[7] And if these provisions are exceptions, they are exceptions of a peculiar sort. They do not merely crave out an area in which the general principle of equality is inapplicable. Rather, they are specifically designed to implement and fulfil the general principle.[8]

Articles 15(4) and 16(4) are undoubtedly exceptions to the constitutional prohibition of State employment of the otherwise forbidden criteria of caste, religion and so forth. But it does not follow that they are exceptions to the policy of equal treatment mandated by articles 14, 15 and 16. In respect to the general policy of equality they represent an empowerment of the state to pursue substantive equality in respect to the disparities between backward classes and others. It might be argued that in a state generally committed to formal equality this commitment to reduce these disparities is an exception. Thus the state could pursue a policy of overcoming the inequalities of backward groups that would lie outside its mandate in dealing with the poor, the handicapped, veterans, or victims of disasters. But it seems clear that these disparities of circumstances and fortune may be addressed by policies utilizing reasonable classifications. So what these clauses do is to ensure state power to pursue substantive equality *vis a vis* certain historic formations in Indian society.

It was the realization that mere provision of formal equality would not suffice to bring about the desired 'equality of status and of opportunity' that led to the adoption of these provisions. As a Full Bench of the Kerala High Court observed:

> It has however been realized that in a country like India where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees (of equality) would be meaningless unless provision is also made for the uplift of such backward classes who are in no position to compete with the more advanced classes. Thus to give meaning and content to the equality guaranteed by articles 14, 15, 16 and 29, provision has been made in articles 15(4) and

> 16(4) enabling preferential treatment in favour of the 'weaker sections'.[9]

Indeed, as the Supreme Court has observed, guarantees of equality might by themselves aggravate existing inequalities. If taken literally,

> instead of giving equality of opportunity to all citizens, it will lead to glaring inequalities . . . In order to give a real opportunity to the (the backward to) compete with the better placed people . . . [Article 16(4) is included in the Constitution.] The predominant concept underlying (Article 16) is equality of opportunity in the matter of employment; and, without detriment to said concept, the State is enabled to make reservations in favour of backward classes to give a practical content to the concept of equality.[10]

The tension between these commitments to non-discrimination and to substantive equalization was poignantly expressed by Prime Minister Nehru when he remarked in the course of the First Amendment debate that '. . . we arrive at a peculiar tangle. We cannot have equality because in trying to attain equality we come up against some principles of equality.'[11] The textual juxtaposition of guarantees of equality and authorization of compensatory discrimination reflects a deeper conflict between different views of equality and divergent notions of the goal and scope of protective discrimination. While in practice these views tend to merge and overlap, it may be helpful here to isolate in pure form what we may conveniently label the horizontal and the vertical perspectives on equality and compensatory discrimination.

In the horizontal view, the relevant time is the present. Equality is visualized as identical opportunities to compete for existing values among those differently endowed, regardless of structural determinants of the chances of success or of the consequences for the distribution of values. One of the dissenting judges in the *Thomas* case sums it up neatly when he cautions that article 16(1) 'speaks of equality of opportunity, not opportunity to speak equality.'[12] In this view, preferential treatment is accepted as a marginal adjustment to be made where results of complete equality are unacceptable. Compensatory discrimination detracts from equality: it amounts to a kind of social handicapping to insure fair present distribution among relevant units. Thus in *Devasan* v. *Union of India* the Supreme Court emphasized that in combining these provisions it might strike a fair balance between the claims of the backward and the claims of other communities.[13]

The relation of equality and compensatory discrimination is viewed very differently in what we may call the vertical perspective. In this view the present is seen as a transition from a past of inequality to a desired future of substantive equality; the purpose of compensatory discrimination is to promote equalization by offsetting historically accumulated inequalities. Thus, compensatory discrimination does not detract from equality in the interest of present fairness; rather, it is seen as requisite to the fulfilment of the nation's long-run goal of substantial redistribution and equalization. Not only present claims but historical deprivations and national aspirations are relevant. Such a view was given its most clear judicial expression in *Viswanath* v. *State of Mysore*, where Hegde, J. repulsed the argument that reservations should be confined with the observation that counsel

> did not appear to be very much alive to the fact that there can be neither stability nor real progress if predominant sections of an awakened Nation live in primitive conditions, confined to unremunerative occupations and having no share in the good things of life, while power and wealth are confined in the hands of only a few and the same is used for the benefit of the sections of the community to which they belong. . . .
>
> Unaided many sections of the people, who constitute the majority in this State cannot compete with the advanced sections of the people, who today have a monopoly of education and consequently have predominant representation in the Government services as well as in other important walks of life. It is cynical to suggest that the interest of the Nation is best served if the barber's son continues to be a barber and a shepherd's son continues to be a shepherd. . . . We have pledged ourselves to establish a welfare State. Social justice is an important ingredient of that concept. That goal cannot be reached if we overemphasize the 'merit theory'.
>
> Advantages secured due to historical reasons cannot be considered as fundamental rights guaranteed by the Constitution. The nation's interest will be best served—taking a long-range view—if the backward classes are helped to march forward and take their places in a line with the advanced sections of the people.[14]

From this 'long-range' perspective, Justice Hegde later elaborated, the 'immediate advantages of the Nation (in the effective utilization of talent) have to be harmonized with its long-range interests'.[15]

Rarely do these contrasting views of equality and compensatory discrimination appear with such purity and clarity; more common is the attempt to harmonize them in what we might call 'the classic compromise': advancement of the backward permits exceptional means and enjoys special priority, but these means and priorities must be balanced against other rights and other interests. Thus in *Balaji* v. *State of Mysore,* Gajendragadkar, J. observes that:

> It is obvious that unless the educational and economic interests of the weaker sections of the people are promoted quickly and liberally, the ideal of establishing social and economic equality will not be attained. . . .[16]

Surely the State is authorized to take 'adequate steps' toward that objective, but these special, exceptional provisions do not override the Fundamental Rights of others. Furthermore, there are other crucial national interests which have to be taken into account:

> The interest of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole.[17]

The inevitable weighing and balancing is rendered particularly difficult because the constitutional provisions set up another tension as to the relevant units whose interests are to be balanced or who are ultimately to be equalized, as the case may be. The Constitution confers Fundamental Rights on individual citizens in their personal capacity, not as members of communal groups. All citizens have a fundamental right that another, excepting a member of a backward class, shall not be preferred by the State on the basis of his membership in a particular group. However the government is obliged to advance the weaker sections of backward classes. Therefore the scope of compensatory discrimination involves tension between individuals or groups as objects of state policy.

The constitutional embrace of the antagonistic principles of equal treatment and compensatory discrimination, individual rights and group rights, confronts both government and courts with the problem of reconciling them in specific settings. The sweeping language of articles 15(4) and 16(4) indicates that their framers relied primarily on the discretion of the politicians and administrators of the future, rather than on the courts, to effect such a reconciliation. But while these provisions give the executive and the legislatures broad discretion in their application, judicial intervention is not entirely excluded. Leverage for judicial oversight is supplied by the placement of these provisions as exceptions to the judicially enforceable Fundamental Rights. These rights can only be vindicated to the extent that the courts scrutinize the government's designation of beneficiaries to see that only the backward are included, that the extent or method of operation does not prejudice others unduly, that the schemes are designed and administered to work in favour of the intended beneficiaries and not to their detriment. Such review is necessary not only to vindicate individual rights but to effectuate the policy of these provisions—by preventing unwarranted dilution of benefits (for the more unrestrained the inclusion of beneficiaries, the less the assistance the intended beneficiaries will receive) and abuses that undermine public support for these measures.

The courts have indeed played a major role in shaping policy in this area by defining the constitutional boundaries of preferential treatment. Recent developments in the constitutional doctrine of equality indirectly raise the question of whether courts might play an even more central role in the design and implementation of compensatory policies.

2. *A new constitutional vista : the Thomas Case*

For the first quarter-century of constitutional development, the approaches discussed in the previous section bounded the discourse about the way in which competing commitments to formal equality and compensatory discrimination might be combined. But much of the earlier understanding of constitutional policies of compensatory is cast into doubt by a remarkable 1975 decision of the Supreme Court in *State of Kerala* v. *N. M. Thomas.*[18]

Employees of the registration department of the State of Kerala were divided into lower division clerks and upper division clerks.[19] The former could be promoted to the higher position on a 'Seniority-cum-merit' basis. To qualify for promotion it was necessary to pass some tests ('account test . . . lower Kerala registration test and . . . test in the manual of office procedures')—this was the merit requirement. Among those who satisfied this prerequisite, the promotions went to the most senior lower division clerks. The rules allowed for temporary appointments to the higher posts for a two-year period during which the clerk would have to pass the required tests, the two years was extended to four years in the case of Scheduled Caste and Scheduled Tribe clerks. Nevertheless a number of Scheduled Caste clerks had not satisfied the test qualifications within the extended period and were facing reversion to the lower posts.

In 1972 the Government promulgated a new rule

> 13AA. Notwithstanding anything contained in these rules, the Government may, by order, exempt for a specific period, any member or members, belonging to a Scheduled Caste or a Scheduled Tribe, and already in service, from passing the tests . . .

On the same day the State promulgated an order granting Scheduled Castes and Scheduled Tribes already in service 'temporary exemption . . . from passing all tests . . . for a period of two years'. In 1974 this was extended for a further period to insure each employee two chances to appear for the required tests. This time the government ordered that 'these categories of employees will not be given any further extension of time to acquire the test qualifications'. Because of earlier difficulties with the test barrier, there was a heavy concentration of Scheduled Caste lower division clerks with high seniority. When the test barrier was removed temporarily, many of them were promoted to the higher posts. Thus in 1972, of 51 vacancies in the category of upper division clerks, 34 were filled by Scheduled Castes who had not passed the tests and only 17 were filled by persons who had passed the tests. A writ petition was filed by N. M. Thomas, a lower division clerk who did pass the test and would have been promoted but for the extensions authorized by rule 13AA.

A Division Bench of the Kerala High Court concluded that: 'What has been done is not to reserve . . . posts . . . [R]eservations had already been made . . . What has been attempted by Rule 13AA is to exempt persons from possessing the necessary qualifications.' Such exemption lies beyond the scope of article 16(4)'s authorization of reservations, and on the scale it is done here, directly violates article 335's directive that claims of Scheduled Castes and Tribes may be taken into account in government employment 'consistently with the maintenance of efficiency of administration. . . '.[20] On appeal to the Supreme Court, counsel for the state took an innovative tack and argued that the extension need not be subsumed under article 16(4)'s provision for reservations, but could be justified as a reasonable classification under article 16(1).[21] A seven judge bench decided five to two to reverse, issuing seven separate opinions.[22] One of the majority judges thought that article 16(4) rightly interpreted would authorize the state's provision; the other four accepted some version of the broad classification argument advanced by the State.[23]

Chief Justice Ray's opinion for the majority sketches the outline of the classification argument: providing equal opportunity in government employment is a legitimate objective; article 46 directs the state to promote the economic interests of Scheduled Castes and Tribes with special care; article 335 directs the state to take into their consideraion their claims regarding service under the state. Thus the classification of employees belonging to these groups to afford them an extended period to pass tests for promotion is 'a just and reasonable classification having rational nexus to the object of promoting equal opportunity . . . relating to (public) employment. . . '.[24] The difference in condition of these groups justifies differential treatment; just as rational classifications permissible under the general equal protection provision of article 14, so it is permissible to treat unequals unequally under article 16.[25]

The extent of the doctrinal innovation here can be appreciated by considering the opinion of Justice Beg, the only member of the majority who does not participate in the reconceptualization of article 16. He helpfully restates a conventional understanding of the constitutional provisions. In this view 'the guarantee contained in article 16(1) is not by itself aimed at removal of social backwardness due to socio-economic and educational disparities produced by past history of social oppression, exploitation, or degradation of a class of persons'.[26] Instead 'it was in fact intended to protect the claims of merit and efficiency . . . against incursions of extraneous considerations'.[27] And efficiency tests, in turn, 'bring out and measure . . . existing inequalities in competency and capacity or potentialities so as to provide a fair and rational basis for justifiable discrimination between candidates'.[28] Thus provisions for equality of opportunity are meant to insure 'fair competition' in securing government jobs; they are not directed to removal of causes for unequal performances . . . '.[29] But such provisions do not stand alone: they are juxtaposed with articles 46 and 335 which imply 'preferential treatment for the backward classes' to mitigate the rigour of equality in the sense of strict application of uniform tests of competence.

> Article 16(4) was designed to reconcile the conflicting pulls of article 16(1), representing . . . justice conceived of as equality (in the conditions of competition) and of articles 46 and 335, embodying the duties of the State to promote the interests of the economically, educationally and socially backward, so as to release them from the clutches of social injustice.[30]

Thus article 16(4) may be thought to 'exhaust all exceptions made in favour of backward classes'.[31] Yet the effect of the Kerala promotion rules here is 'a kind of reservation', for it is a temporary promotion that would be confirmed only if the appointee satisfied specified tests within a given time. These rules may be viewed as 'one of only a partial or temporary and conditional reservation' which could be justified under Article 16(4). . . .[32]

Dismissing the interpretation of article 16(4) as an exception to article 16(1), Justice Mathew articulates the view of equality that implies the doctrinal shift. The equality of opportunity guaranteed by the Constitution is not only formal equality with fair competition, but 'equality of result'.[33] In order to assure the disadvantaged 'their due share of representation in public services' the Constitutional equality of opportunity was fashioned 'wide enough to include . . . compensatory measures. . . .'[34] Thus the guarantee of equality 'implies differential treatment of persons who are unequal.[35] Article 16 (1) is 'only a part of a comprehensive scheme to ensure equality in all spheres'.[36] It implies 'affirmative action' by government to achieve equality—that is, 'compensatory state action to make people who are really unequal in their wealth, education or social environment . . . equal'.[37]

> If equality of opportunity guaranteed under Article 16 (1) means effective material equality, then article 16 (4) is not an exception to article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation.[38]

Thus 'the state can adopt any measure which would ensure the adequate representation in public service of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided the measure does not dispense with the acquisition of the minimum basic qualification necessary for the efficiency'.[39]

Justice Krishna Iyer propounds a complex vision of the constitional commitment to equality. Interpreting the constitution by 'a spacious, social science approach, not by pedantic, traditional legalism',[40] he proposes to erect a 'general doctrine of backward classification' to pursue 'real, not formal, equality'.[41] According to the doctrine of backward classification, the state may, for purposes of securing genuine equality of opportunity, treat unequals equally. Thus article 16 (4)

> serves not as an exception [to the strictures of article 16 (1) and (2)] but as an emphatic statement, one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to. . . . Closely examined it is an illustration of a constitutionally sanctified classification.[42]

So, in addition to reservations provided by article 16 (4), the state may also confer 'lesser order (s) of advantage' on the principle of classification under article 16 (1).[43]

At this point in the argument there is a crucial divergence between the views of Justice Krishna Iyer and those of Justice Mathew. For the latter, the compensatory measures authorized by article 16 (1) might be extended to "all members of the backward classes",[44] not only to the Scheduled Castes and Scheduled Tribes. But Justice Krishna Iyer's more complex vision of article 16 contains a second layer: the power of classification outside the boundaries of article 16 (4) for the purposes of overcoming inequality may be used only on behalf of Scheduled Castes and Tribes.

> Article 16 (4) covers all backward classes, but to earn the benefit of grouping under article 16 (1) based on articles 46 and 335 . . . the twin considerations of terrible backwardness of the type harijans have to endure and maintainance of administrative efficiency must be satisfied.[45]

'Not all caste backwardness is recognized' as a basis for differential treatment under article 16 (1).[46]

> The differentia . . . is the dismal social milieu of harijans. . . . The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search . . . we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes . . . no class other than harijans can jump the gauntlet of 'equal opportunity' guarantee. Their only hope is in article 16 (4).[47]

This is perplexing, for it appears that the stronger measures of reservation may be taken on behalf of all the backward, yet those who suffer the most terrible backwardness are the only ones entitled to measures which confer 'a lesser order of advantage'.

Later he suggests that to allow the other backward classes to participate in these benefits may be detrimental to those who are most deserving

> . . . no caste, however seemingly backward . . . can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens. To them the answer is that . . . equality is equality. . . . The heady upper berth occupants from backward classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need based bulk of the backward of the . . . advantages the nation proffers.[48]

This distinction is justified because 'the Constitution itself makes a super-classification between harijans and others, grounded on the fundamental disparity in our society and the imperative social urgency of raising the former's sunken status'.[49] From the provision of articles 330, 332, 335, 338 and others, we may deduce that 'the Constitution itself demarcates harijans from others. . . . This is based on the stark backwardness of this bottom layer of the community'.[50] This constitutional differentiation of Harijans is specifically extended to the area of government employment as part of the State's obligation to 'promote the economic interests of harijans and like backward classes'. Article 14 and 16 are, according to Justice Krishna Iyer 'the tool kit' to carry out the 'testament' of articles 46 and 335.[51]

An attenuated form of this 'super classification' argument is found in each of the four majority opinions that embrace the classification argument. That argument posits a general authorization flowing from article 16(1) to adopt reasonable classifications for purposes of securing equality of opportunity. But it is conceded that this does not include a power to employ those classifications specifically forbidden in article 16(2). Therefore each of these four 'classification' opinions argues that the Scheduled Castes and Tribes do not comprise a classification on the basis of 'caste'.[52]

Thus Justice Krishna Iyer argues that the ban of article 16(2) doesn't arise in connection with measures for the Scheduled Caste and Scheduled Tribes for they are 'no(t) castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found . . . to be the lowliest and in need of massive State aid and notified as such by the President'. Article 16(4) allows use of these forbidden grounds to identify the backward classes that may be recipients of reservation. The four judgements imply that the other kinds of compensatory treatment justified directly by article 16(1) are available only to classes which avoid the classification forbidden by article 16(2), including Scheduled Castes and Tribes since they are not castes. But if the idea is to confine compensatory classification under article 16(1) to Scheduled Castes and Tribes, this argument proves too much. For there are innumerable categories — *e.g.,* on the basis of income, occupation, physical handicap, *etc.* — that are not based on the classifications forbidden in article 16(2). The argument for Scheduled Castes and Tribes as a 'superclassification' cannot be sustained on the basis of the structure of article 16, but only on the basis of their special recognition in the Constitution. But if that is the argument for their distinctiveness, the fact that they are not 'castes' within article 16(2) is a distracting irrelevance.

In this and other matters, the *Thomas* opinions leave open many perplexing questions. Are equalizing measures permissible even if they employ the categories forbidden by article 16(2)? Or, conversely, is the power to adopt equalizing classifications under article 16(1) to be used exclusively to address disparities along the dimensions listed in article 16(2)? How about differences in class? Income? Is the doctrine of classification merely permissive, so that government may make such compensatory classifications, but need not? Suppose it fails to do so? Do classifications that do not take account of inequalities violate the article 16(1) guarantee of equality of opportunity?

Yet *Thomas* is welcome because it makes unavoidable reflection on compensatory treatment. By revealing the constitutional indeterminacy and doctrinal disarray in this field, it poses new challenges for jurisprudence and policy. Where courts could rely without much thought on quotations from *Balaji* or *Sagar,*[53] they must now articulate their choices. Actors, governmental and private, can no longer assume that the categories of compensatory policy are immutable.

3. *A symbolic break-through, but . . . who gets what, when, how?*

In terms of doctrinal housekeeping, there was little need for the *Thomas* reconceptualization of article 16. 'Reservation' in article 16(4) could readily have been construed to accommodate the Kerala scheme (as it was by Justice Beg). Such a construction would usefully have clarified the status of the age-waivers, fee concessions, travel allowances, coaching schemes, lowering of minimum marks and other provisions that typically accompany reservations and often exist apart from reservations *per se*. If the state enjoys the plenary power to reserve places for a beneficiary group, does this not imply a power to take lesser measures to help the members of that group obtain places? In order to join issue with the large questions, the *Thomas* majority (the four) had to accede to a very narrow definition of 'reservation' so that all of these practices are now exposed to challenge and possibly to the necessity of securing justification on broad classification principles, a course which may be strewn with conceptual landmines. Thus the radical reconceptualization of article 16 arrives on the agenda at the cost of an unimaginatively narrow reading of what common sense would regard as the most relevant constitutional provision, article 16(4).

A generous construction of article 16(4) would not only have addressed the problem in *Thomas*, but would have been readily comprehensible to all the different groups concerned with reservations in government posts — officials in charge of appointments and promotions, government servants and aspirants to government posts. *Thomas* reaches the same immediate outcome by elaboration of ambiguous and recondite doctrine that is not readily accessible to officials who must design and manage programmes of preference, or/to the beneficiaries of such programmes, or/to disappointed non-beneficiaries — or in large measure even to lawyers and judges.

Perhaps, though, the accomplishment of *Thomas* lies in its providing government with more ample means to pursue compensatory policies. The doctrinal obstacles that might have impeded governmental policies in this area stood for the most part on weak ground, unlikely to withstand sustained conceptual attack.[54] Openings for favourable reinterpretation were plentiful. To bestow on government more ample authority to do something does not automatically mean that more of it will get done. Was the critical shortage one of doctrine favourable to such policies? Or the will, energy and competence to implement them?

Consider the situation of the Kerala Registration clerks in *Thomas*. The State's scheme here seems less a carefully calculated modification of job requirements than a desperate improvisation amounting to a confession of failure of its earlier policies. Extensions hadn't worked before, so another one is tried. There is no indication that any thought was given to (1) some ways of helping the Scheduled Caste lower division clerks prepare to pass these tests; nor to (2) modifying the tests to eliminate cultural biases or extraneous matters and measure qualities genuinely needed for the job; or (3) modifying the job to make it suitable to candidates with the qualifications of these applicants. The immediate thrust of the decision is to enlarge the State's authority to confer preferential treatment. But the failure of the earlier measures was not due mainly — perhaps even at all — to lack of state authority, but to lack of will or capability to make its schemes work. Enlarging state authority will not necessarily supply the lack. Indeed, it may allow the State to substitute easy shortcuts (like the one here) for thinking about how to do the job effectively. Since it may now in effect decree the result of keeping these clerks in the higher posts, it may have less incentive to devise ways of motivating or enabling them to grasp these opportunities and improve their performance, thus prolonging their lack of qualification and reinforcing their dependence. And, as the State's authority is more broadly defined, there will be fewer occasions for the courts to observe state programmes and to monitor and energize government performance.

Of course, it is not only a question of the capability of the State, but also of the recipients of preferential treatment. The argument in favour of the extension of the Scheduled Caste clerks in the upper division posts is that it will somehow motivate or equip them to pass the test eventually. And unless they are motivated and enabled to take the initiative and improve their own capacity to perform the extension and any compensatory measure for that matter is only a temporary palliative. There is no indication that the State of Kerala in any way enhanced its ability to elicit a satisfactory performance from these clerks.[55]

Thus *Thomas* does not offer any hope of breaking out of the pattern of patronage and dependence. Both majority and minority judgements visualize the Scheduled Castes as the passive recipients of governmental largesse, rather than as active participants in their own improvement. And for all its apparent radicalism, *Thomas* enlarges state power in a way that may jeopardize the future of compensatory preference for the backward classes. In two senses this enlargement is a false victory for the Scheduled Castes.

First, the court passed up the chance to make the modest contribution of usefully expanding the meaning of reservations to align doctrine with existing practice about age waivers, coading schemes, etc. In taking the more radical course, the court attempts to make legal doctrine yield up benefits that it cannot yield. Doctrine can give only authority, not power. And the crucial shortage was not of state authority, but of the will and capacity of the State to deliver benefits (and of the recipients to utilize those opportunities to enlarge their capabilities). The result is a symbolic break-through in which Scheduled Castes, their well-wishers and wider publics are beguiled into thinking that much (or too much) is being done for Scheduled Castes.

Second, the new reading of equality may detract from the attention and priority accorded to the backward classes. The new equality doctrine is so ample that it sweeps in its path all that confines the commitment to compensatory treatment to specific historic groups. If articles 14-16 proclaim a regime of substantive equality and if the State may employ classification to remedy any falling short of the equality thus mandated, the government's responsibility to confer compensatory preference is vastly larger than it has hitherto been understood. It is a responsibility that runs not only to Scheduled Castes and Tribes and to backward classes more widely conceived, either in terms of social groups or the poor. It also includes those who suffer difficulties as a result of personal misfortune (disaster victims), accidents of personal history (the physically handicapped) or as a result of meritorious service to the nation (ex-servicemen or dislocated children of diplomats).

In a setting of chronic shortage, an enlarged commitment to remedy all undeserved difficulties betokens a commendable generosity of spirit. But it also raises the question of priorities and of allocation of scarce resources, including attention. The Government's authorization to pursue substantive equality is vastly greater than the resources that will conceivably be available to it. Among the claimants on its compensatory powers will be many who are better placed to press their claims on the attention and sympathies of government. Will not the commitment to the lowest social groups — especially where these are perceived to receive massive benefits — be overwhelmed by governmental response to better-placed claimants on its compensatory attention?

Of course, the State could always take account of these difficulties under article 14 in terms of reasonable classification. But the notion that the State has a general obligation to produce substantive equality means that the kinds of disadvantage that afflict the better off — diplomats, central government employees, retired army officers, physically handicapped children in well-to-do, educated families — are now elevated, as far as compensatory responsibilities go, to parity with the government's commitment to overcome disparities associated with the traditional social hierarchy. The earlier sense of a regime of formal equality qualified by a singular exception to alleviate disparities derived from position in the traditional social hierarchy is now liquidated or dissolved into a general and unfulfillable commitment to substantive equality.

The distributive potential of this new dispensation is dramatically realized in *Jagdish Rai* v. *State of Haryana* where the State reserved a substantial portion of government posts for ex-servicemen on the ground that they were handicapped because 'over the years [they] have lost opportunities for entering government service and have also lost contact with ordinary civilian life'.[56] The Full Bench sweeps aside the notion that reservations have to be justified by article 16(4) as 'a relic of the old way of thinking. . . . The old idea has now given way to the idea that [article 15(4) and article 16(4)] . . . are themselves aimed at achieving the very equality proclaimed and guaranteed by article 14 and other clauses of articles 15 and 16'.[57] After extensive citation from *Thomas*, which it commends for having 'got rid of the old sterility' and 'introduced a new dynamic and a new dimension into the concept of . . . equality of opportunity', the court observes that '[i]t is no longer necessary to "apologetically" explain laws aimed at achieving equality as permissible exceptions. It can now be boldly claimed that such laws are necessary incidents of equality'.[58] Reservation of posts for ex-servicemen is justified for they suffer difficulties in competing with civilians for civilian job and the State has an obligation to provide them employment. Thus the state is justified in classifying them separately as a source of recruitment.[59] To secure a just proportion of posts to those who suffer a peculiar handicap in competition is 'an extension of the principle of article 16(4) to those that do not fall under article 16(4)'.[60]

In effect, other deserving groups are now entitled to reservations along with the backward classes specified by article 16(4) and in effect, all the kinds of preferential treatment which seemed to be allowed exclusively to the backward classes may now be bestowed on other groups regarded as deserving by the State. It is a fitting symbol that the losing petitioner in *Jagdish Rai* was herself a Scheduled Caste.

Thus *Thomas* opens pandora's box: compensatory classification is available — perhaps incumbent — to succor all the disadvantaged. The earlier notion that 'the interests of the weaker sections are a first charge'[61] on government is dissolved into a diffuse, and in the nature of things, largely symbolic, generalized egalitarianism. Justice Krishna Iyer's doctrine of super-classification may be understood as an attempt to close the lid again, confining compensatory classification to Scheduled Castes and Tribes. Were this doctrine to gain acceptance, state authorization to confer benefits on these groups might end up not very far from where liberal reading of article 15(4) and 16(4) would have left it. Super-classification would reestablish the priority of Scheduled Caste claims by emphasizing a picture of Indian society as riven by an unbridgeable dichotomy between Scheduled Castes and Tribes and the rest of the population. This dichotomous picture, by drawing a rigid line between Scheduled Castes and other backward classes, could impede programme administration and obstruct the eventual dismantling of preferential treatment by preventing merger of these categories. More immediately, it would further stigmatize Scheduled Castes and Tribes by portraying them as uniquely hapless and helpless specimens, a potential demonstrated in the overtones of condescension found in some of the *Thomas* opinions.

But it would be shortsighted to judge *Thomas* only in terms of what it does to governmental power in this area. There is another side to the coin and one that is potentially of even greater significance. If articles 14, 15, and 16 are read as mandating the pursuit of substantive equality, then to what extent is substantive equality — or at least governmental efforts to promote it — an enforceable Fundamental Right? Since those denied Fundamental Rights may resort to the courts to enforce them, would the potential beneficiaries of such equalizing measures have a right to resort to the courts to secure governmental compliance with this right of equalization?

It would not be surprising if the courts would shrink from affirmative enforcement of these reconceptualized rights to equality. But imagine for a moment that they were willing to do so. Scheduled Castes and others would not have to wait for government preference in their behalf, but could take the initiative in the courts to secure the 'enforcement' or implementation of their rights to substantively equalizing measures. Scheduled Castes movements could mobilize around these issues, generating the kind of political movement that would make government responsive to judicial proddings.

We shall in a moment mention the doubts that surround this scenario. But to emphasize it once more, in this reading the ultimate significance of *Thomas* is not the enlargement of state authority to confer preferential treatment, but the acknowledgement of a Fundamental Right to substantive equality and the possibilities for affirmative litigation by disadvantaged groups to force the state to fulfil its responsibilities. This would amount to an ironic reversal of the meaning of *Thomas*. We started with the obvious view that *Thomas* loosened judicially-imposed restraints on government, allowing it to patronize the least advantaged; we end by viewing *Thomas* as suggesting the imposition on government of a new and onerous accountability to these disadvantaged, an accountability mediated through the courts.

This scenario is subject to a number of contingencies. First, do the litigants and their lawyers have the legal imagination to devise these claims? Second, do they have the capacity to organize to sustain such litigation and press for the implementation of favourable rulings? (Of course, the capacity for organization might be enhanced by creative deployment of legal services.) Third, are the judges likely to be responsive to such claims, claims that ask them to depart from deeply held notions about the judicial role? They would have not only to innovate original standards of what is appropriate movement towards equality, they would have to undertake a sustained activist monitoring of government that they may find both ideologically uncongenial and institutionally discomfiting.[62] (Were they to shrink from this, while maintaining an interpretation of equality rights as substantive, *Thomas* would, in the guise of exalting the Directive Principles, have helped to demote these Fundamental Rights to the non-enforceable status that led to the disdain of the Directive Principles.) Fourth, even if claimants come forward and courts are responsive, do the realities of litigation in India, the delay and manoeuver and cost, make it possible for groups to improve their position through litigation against powerful adversaries? This is related to a fifth contingency: are the real barriers to improvement of the conditions of these groups reachable by even most well-disposed and capable judiciary? To what extent is the notion of remedying these problems through litigation yet a further tempting illusion?

4. *Conclusion*

It is not clear yet in what ways and how deeply *Thomas* will transform earlier doctrine and practice. It was pronounced by a divided court; it expresses the heated symbolic egalitarianism that was both institutionalized and discredited during emergency rule. It liberates the courts conceptually from what we tagged the 'classic compromise' on compensatory discrimination, but it does so at the cost of obscuring and diffusing the commitment to remedy the historical plight of the lowest groups in Indian society. But if it provides no satisfying answers, its presence invites and requires some fresh thought about the principles underlying compensatory discrimination policies and about the role of courts, lawyers, and citizens in effectuating them.

REFERENCES

* This essay is drawn from my book, *Competing Equalities: The Indian Experience with Compensatory Discrimination*.

† The Equality provisions of the Indian Constitution are:

14. Equality before the law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

16. Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to public employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to any office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

1. A.I.R. 1963 S.C. 649, 657.
2. A.I.R. 1968 S.C. 1378. The characterization of art. 15(4) as an exception reappears in *State of A.P.* v. *Balaram*, A.I.R. 1972 S.C. 1375, 1394 and *Janki Prasad* v. *State of J. & K.*, A.I.R. 1973 S.C. 930, 937.
3. A.I.R. 1964 S.C. 179, 187.
4. *Id.* at 190.
5. A.I.R. 1968 S.C. 507. The argument was based upon Subba Rao, J.'s dissent in *Devadasan* v. *Union of India*, A.I.R. 1964 S.C. 179.
6. A.I.R. 1968 S.C. 507 at 513.
7. Arts. 37 and 46.
8. *Cf.*, Gupta 'Justice: Unequal but Inseparate' (1969) 11 *J.I.L.I.* 57, 83, who notes that these provisions '. . . are only to be viewed as defining the principle of equality as contained in article 14. They do not derogate from the principle of equality in any manner'.
9. *Hariharan Pillai* v. *State of Kerala*, A.I.R. 1968 Ker. 42 at 47-48.
10. *Triloki Nath Tiku* v. *State of Jammu and Kashmir*, A.I.R. 1967 S.C. 1283 at 1285.
11. XII-XIII *P.D.* (Part II) col. 9617.
12. Gupta, J., dissenting in *State of Kerala* v. *N. M. Thomas*, A.I.R. 1976 S.C. 490 at 543.
13. *Devadasan* v. *Union of India*, A.I.R. 1964 S.C. 179. *Cf.*, *C. A. Rajendra* v. *Union of India*, A.I.R. 1968 S.C. 507.
14. A.I.R. 1964 Mys. 132 at 136. A more summary and less vivid version of these observations was delivered by Justice Hegde after his ascension to the Supreme Court in *Periakaruppan* v. *State of Tamil Nadu.*
15. *Periakaruppan* v. *State of Tamil Nadu*, A.I.R. 1971 S.C. 2303 at 2309.
16. A.I.R. 1963 S.C. 649 at 661.
17. *Id.* at 663.
18. A.I.R. 1976 S.C. 490.
19. The version of the facts here is a composite drawn from the accounts provided at various places in the seven opinions. I noted no major discrepancies in these accounts. See A.I.R. 1976 S.C. at 493-95, 496-97 to 501, 502-04, 520, 523. One factual question puzzled me: what would happen to these clerks at the expiration of the extension period if they had not passed the tests? My initial reading was that during the period that they were incumbents in the higher posts, they were eligible for promotion on seniority and since they were exempt from passing the tests, they would be confirmed in the higher posts on grounds of seniority. But the judges are unanimous that this is not the case, that the extension is only temporary, and that the tests must be passed before they can be confirmed in the higher posts. Ray, C.J. at 502, Mathew, J. at 520, Beg, J. at 523, Fazl Ali, J. at 544.
20. *Thomas* v. *State of Kerala*, I.L.R. 1974 (1) Ker. 549 at 556-57.
21. In the High Court, counsel for the state had argued unsuccessfully that the state's action fell within the meaning of 'reservation' in art. 16(4), I.L.R. Ker. 1974 (1) at 561. Counsel had also advanced an ingenious textual argument that if the reservations were covered by art. 16(4), then preference in government employment apart from reservations was authorized by art. 15(4), but the court held that art. 16(4) covered the employment area and its provisions exhausted the government's power to deviate from the guarantees of arts. 16(1) and 16(2), *id.* at 557. There is no indication that counsel urged that arts. 16(1) or 16(2) themselves conferred power to make such arrangements.

22. *State of Kerala* v. *N. M. Thomas*, A.I.R. 1976 S.C. 490. The appeal was argued just after the onset of Mrs. Gandhi's emergency rule and the decision was announced on 19 September 1975, at the end of three months of emergency rule and at the height of optimism that it heralded an 'egalitarian break-through'.
23. Although *Thomas* marks a sharp departure from earlier doctrinal analysis of the special provisions for backward classes, it was not without precursors and anticipations. Thus classification standards were used to permit reservations for various deserving groups in medical admissions. (*Cf.*, *Chanchala* v. *State of Mysore*, A.I.R. 1971 S.C. 1762.) For example, *Sardool Singh* v. *Medical College*, A.I.R. 1970 J. & K. 45, applied general art. 14 classification standards to permit reservations in medical admissions for children of defense personnel, noting that art. 14 permits such classification quite apart from the specific provisions for reservations in arts. 15(4) and 16(4). Reservations of government posts for ex-servicemen were upheld on a similar ground in *Daya Ram* v. *State of Haryana*, A.I.R. 1974 P. & H. 279. The classification argument might be made where the beneficiaries would come under art. 15(4) or 16(4), as in *Raju* v. *Chief Electoral Officer*, A.I.R. 1976 Guj. 66, decided nine months before *Thomas*. The High Court had no difficulty in justifying a lower electoral deposit for Scheduled Castes and Tribes on art. 14 grounds. The extent to which classification principles were perceived as available to justify compensatory preference is suggested by the remarks of Chief Justice Hidayatullah in *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643 at 1706.
24. A.I.R. 1976 S.C. at 500.
25. *Id.* at 502.
26. *Id.* at 522.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. *Id.* at 524.
33. *Id.* at 518.
34. *Ibid.*
35. *Id.* at 516.
36. *Id.* at 519.
37. *Id.* at 516. The idea of affirmative action is attributed to the United States Supreme Court, citing cases involving the unconstitutionality of the poll tax and the right of criminal defendants to a free transcript and to counsel on appeal.
38. *Id.* at 519.
39. *Ibid.*
40. *Id.* at 525.
41. *Id.* at 529.
42. *Id.* at 535.
43. *Id.* at 536.
44. *Id.* at 519.
45. *Id.* at 536. Although here and elsewhere in his opinion, Justice Krishna Iyer uses the term 'harijans', his explanations suggest that he is employing this as a shorthand term for both Scheduled Castes and Scheduled Tribes.
46. *Id.* at 537.

47. *Ibid.*
48. *Id.* at 539.
49. *Id.* at 532-33.
50. *Id.* at 533.
51. *Ibid.*
52. *Cf.*, Chief Justice Ray, *id.* at 501; Justice Mathew, *id.* at 519; Justice Fazl Ali, *id.* at 549, 552. But *cf.*, Justice Gupta, *id.* at 542.
53. *Balaji* v. *State of Mysore*, A.I.R. 1963 S.C. 649 and *State of Andhra Pradesh* v. *Sagar*, A.I.R. 1968 S.C. 1379, are dutifully and copiously cited in cases involving the backward classes, but rarely subjected to critical analysis.
54. For example, the quantitative restrictions imposed by *Devadasan* v. *Union of India*, A.I.R. 1964 S.C. 179, or the restrictions on the use of layers of preferential treatment found in *Balaji*, *id.* at 649, and elsewhere.
55. I am directly informed that by June 1978, most of the Scheduled Caste clerks whose promotion sparked the *Thomas* case have been provisionally certified as upper division clerks upon passing the departmental test.
56. A.I.R. 1977 P. & H. 56, 61. Since India has no conscription, these were volunteers. Two separate reservations figured in this case: the Division Bench addressed a 50 per cent reservation for 'Ex-Emergency Commissioned Officers' as demonstrators in a Dental College, *id.* at 57. On reference to a Full Bench, attention shifted to a reservation of 28 per cent of posts of sub-inspectors in the Food and Supplies Department for 'released Army Personnel', *id.* at 58.
57. *Id.* at 58.
58. *Id.* at 60.
59. *Id.* at 61. The 'source' language is borrowed from *Chanchala* v. *State of Mysore*, A.I.R. 1971 S.C. 1762. This borrowing confirms the suspicion that the distinction between making reservations and specifying sources is a thin one indeed.
60. *Id.* at 61.
61. *Balaji* v. *State of Mysore*, *supra* note 53 at 651.
62. The accomplishments, problems, and discomforts of the American counterpart of this kind of activist 'public law' judging have spawned an immense literature. A useful introduction is provided by Chayes, The Role of the Judge in Public Law Litigation, (1976) 89 *Harv. L.R.* 1281; D. Horowitz, *The Courts and Social Policy* (1976); Galanter, Palen and Thomas, The Crusading Judge: Judicial Activism in Urban Trial Courts, (1979) 52 *Southern Calif. L.R.* 699.

16

THE SUPREME COURT OF INDIA AS A POLITICAL INSTITUTION

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Ten analytically distinct components which contribute to a picture of the Supreme Court as a political institution are discussed. These ingredients are discussed under three broad headings borrowed from the conceptual baggage of political systems analysis.[1] Four (politically important institution, judicial review and political power, judicial policy-making, and assigned and acquired political roles) are visible primarily via the *outputs* (decisions) of the court, and the impact and political responses that follow. Another four (political environment, legitimacy as a political resource, politicization by outsiders, and litigation as political action) are classified as *inputs,* and deal with aspects of the environment in which the court is embedded, especially with some of the ways in which non-judicial actors treat the court as a political institution. The remaining two (judges as political actors, chief justices as special wielders of power) look at aspects of the *conversion* or decision-making stage, and examine some behaviour of judges that contributes to the view of the court as a political institution.

Outputs

1. *Politically important institution*: The Supreme Court is a politically important institution, not just an important institution. The court is very much involved in national affairs; it plays an important role in the political system of India. There is not in India a distinct legal domain headed by the Supreme Court that is somehow wholly separated from a distinct political domain headed by the Executive and Parliament. Much of what the court and its judges do affects politics and political life. The court is certainly not peripheral to Indian politics. It is a major actor in the political

process of India, which means that judges are among the elite that participate in governing India.[2]

The court's political significance is easy to demonstrate. During the past 30 years, one of the most characteristic features of Indian politics has been disagreement or conflict between the court and the Parliament-Executive following decisions of the court. Major conflict followed *Golak Nath, Bank Nationalization, Privy Purses, Kesavananda,* and the recent *Minerva Mills* decision. *Kesavananda,* which held that plenary constitutional amending powers could not be entrusted to the elected representatives of the people, was a proximate cause of the first supersession, which in turn produced a different but related major controversy. Largely in reaction to her defeats in *Bank Nationalization* and *Privy Purses,* Mrs. Gandhi dissolved Parliament and called the first midterm national elections in the country's history.

Each of these decisions sought to set limits on the exercise of political power, and each resulted in conflict between the court and the government. Any institution which, as a result of actions it takes, can thwart a Government which has at its command majority support in Parliament, is an important political institution.[3] There surely would be no need for the Executive-Parliament to have confrontations with the court if the latter was not an important factor in Indian politics.

It is not simply the court decisions that have triggered altercations between the court and the government that provide evidence that the court is an important political institution. There are many other issues with which the court routinely deals (*e.g.*, virtually any kind of alleged deprivation of personal liberty) which may not result in institutional conflict, but which are nonetheless important political issues. The most important decision (actually an advisory opinion, but the distinction between these and ordinary decisions has virtually disappeared) of 1977 was probably the *Dissolution* ruling. Because the court accepted the government's position, that decision provoked no court-government conflict, but it obviously had enormous political consequences that year in legitimizing the dissolution of nine State governments, and the longer range political significance of that decision was apparent in 1980 when another government at the Centre dissolved another group of State governments. That 1977 decision seems to have conferred judicial approval to the demise of Indian federalism.

The fact is that very few of the issues that have figured prominently in Indian politics during the past 30 years have failed to be dealt with, in appropriate legal-constitutional terms, directly or indirectly, by the Supreme Court. Important political, social, and economic questions generally not put to judges in other countries are decided by the court. The more the court deals with important political issues, the more the court can be perceived as an important political institution.

2. *Judicial review and judicial power*: Little of the above would be true if the court was not in possession of power and authority. The most obvious and most commented upon manifestation of this power is judicial review — the power to overturn or annul decisions of the Cabinet and Parliament. Judical review places the court in the middle of the political process. A tribunal with power to declare invalid or unconstitutional what legislatures and executives have done is exercising political power. The whole idea of judicial review. its very *raison d'etre,* is that the court should act as a brake — representing a permanent law, restraining the whims of sitting legislators, if necessary "fighting" the outputs of the political process, in the name of a higher law. Stripped of romantic and legalistic rhetoric, judicial review enables the Court to set limits to executive and legislative power, limits in the Indian context more powerful and meaningful than the people at large can set,[4] or that the political opposition can set, weak as the latter has been for most of the past three decades. Most simply stated, judicial review is judicial power, and this power, both in theory and in practice, is a form of political power.

The court has claimed and exercised the power to review and reject not only legislation and ordinances but, since *Golak Nath* and *Kesavananda,* has gone further than any constitutional court in the world in claiming and effectively exercising the power to invalidate constitutional amendments as well. The power to do the former, while often causing controversy both in terms of what the court vetoed and the reasons offered by the court, has not been the subject of much controversy, for it is widely acknowledged, by both foes and friends of the court, that the framers clearly intended the Supreme Court to have the power of judicial review. Less widely accepted is the court's claim of power to determine the validity of constitutional amendments, a claim made immensely more complicated by the fact that most amendments have been motivated by what the dominant political elite has regarded as errant court interpretations of the Constitution that need to be corrected or circumvented.

The record reveals that the judges have not been chary of exercising their review and reject powers. During the first seventeen years of its existence, there were 128 decisions in which the court ruled legislation invalid in part (70 State laws, 27 Central laws), or in its entirety (27 State laws, 4 Central laws).[5] By now the tally must be over 200.

The power and authority of which we are talking cannot be measured or demonstrated simply by such data as just presented, for ultimately and realistically judicial power is equivalent to political power largely to the extent that the court's decisions are honoured, accepted, and implemented. In many instances, apparently most, the Government's response to an "adverse" decision has been a revision of the legislation found wanting by the court, along lines suggested by the court. But the official response to a significant number of major decisions that have gone against the government has been an effort to circumvent such decisions via amendment of the Constitution, the sheltering of certain legislation from court scrutiny in the Ninth Schedule, the devising of new limitations on the court's power, or some other step believed capable of solving the problem presented by the court. (The first supersession was one such other step.) Of the 45 amendments enacted between 1951-1980, 21 sought to limit the exercise of judicial power. It is extremely significant that never has a Supreme Court decision been explicitly ignored.[6]

So a judicial determination that a particular act or ordinance is unconstitutional or otherwise *ultra vires* seldom settles the matter or results in the issue being removed from the political agenda. The court claims that the Constitution is what the court says it is, and even claims the power to determine the validity of constitutional amendments. The reality, however, is that the Parliament-Executive provides very serious competition when it comes to interpreting the Constitution. Indeed, since 1950, the following scenario has been repeated on a number of occasions. Parliament (or a State legislature) passes a law, aggrieved private interests move to the courts and claim that the statute infringes their constitutionally-guaranteed rights, the court agrees and declares the law invalid in part or in its entirety, Parliament responds either by passing a revised version of the measure with the intent of either meeting the judges' criticisms or making their own intent more clear, or takes the stronger step of enacting a constitutional amendment designed to eliminate or at least constrict the court's review powers in an effort to eliminate further judicial roadblocks in the subject-matter area (this may include the additional step of inserting the legislation in the Ninth Schedule), the aggrieved parties then return to the courts with the argument that this legislative response is also constitutionally wanting in some way, the judges now either confer their blessings on the statute or amendment, or find it constitutionally wanting again, thus provoking another legislative response, more litigation, another ruling by the court, almost *ad infinitum*. These chains of events — and there have been several replays of this scenario involving the complicated and emotional property rights — land reform-compensation issue — point to the conclusions that often neither court decisions nor parliamentary responses are the final word, that each are often but one act of a complex and lengthy political drama, and that winners are often difficult to identify. The right to property as interpreted by the court, long a source of acrimony between the court and Parliament, is no longer a Fundamental Right. Of course, this "defeat", if that is the appropriate label, may be more apparent and temporary than real and permanent, for the past 30 years provide ample evidence that the judges do not relinquish power to Parliament without offering strong resistance. Judges have demonstrated a large measure of tenacity in the face of Parliamentary efforts to overrule them or diminish their authority.

Another dimension of the court's political power is that of stigmatizing or legitimizing the behaviour of the political elite and its activities. A good example of this "power of stigmatization" is Mrs. Gandhi's election case. The fact that Mrs. Gandhi was accused of corrupt election campaign practices after the 1971 national election by Raj Narain meant very little at the time, and went virtually unnoticed both within India and by the world press. But when Justice Sinha, an obscure single judge of the Allahabad High Court, ruled in June of 1975 that Mrs. Gandhi had indeed violated the election law, this was headline news not only in India, but received prominent coverage by the printed and electronic media in many parts of the world. The stigma resulting from this judicial pronouncement resulted in far more political damage to Mrs. Gandhi than Raj Narain's earlier allegations, and was not completely erased later in that year when the Supreme Court reversed the High Court ruling, for by then it was common knowledge inside and outside of the country that Mrs. Gandhi had in the interim between the High Court judgment and the Supreme Court appeal retroactively amended the election law so as to eliminate her illegal actions from the list of actionable offences. These judicial actions involving Mrs. Gandhi, particularly those of June, affected not only the political context within India, but also were a major determinant of the quantum of international legitimacy Mrs. Gandhi and her regime had in 1975-1977. Any judicial tribunal whose decisions so affect not only the national political situation, but the government's international stature as well, obviously has the power to affect politics in a most substantial way.

As important as judicial review and constitutional interpretation are, it ought not be overlooked that the routine interpretation and application of statutes are also means by which the court exercises power. Leeway in interpretation translates into judicial power. The enactment of laws may be a customary manifestation of the exercise of legislative (political) power, but to the extent that the effective meaning of laws is determined by courts, the courts are exercising an ultimately more important political power.

3. *Judicial policy-making*: To the extent that the court is a policy-making institution, it is a political institution. It is patently clear that court decisions have affected public policy, but does the court also make policy? The answer would seem to be yes. In *Golak Nath,* and reiterated in *Kesavananda, Indira Nehru Gandhi*, and *Minerva Mills,* the court first devised, and then implemented the policy that regardless of what the Constitution appears to say, or what others might think, Parliament's power to amend the Constitution is not plenary. Standing back and taking a long view of all the various right to property cases, particularly those dealing with the issue of compensation for property taken by the State, it is not unreasonable to arrive at the conclusion that the court's policy was, for the most part, that individual property rights were of higher value than the competing value, articulated by the government, of economic justice.

In *Bank Nationalisation* and *Privy Purses*, the government had made policies that were rejected by the court, so the court's policy-making in these instances was of a reactive nature, *i.e.,* the government proposed and the court disposed. It is important to recognize that when the court rejects a government policy, the result is the explicit or implicit substitution of another policy. A generation ago, when in *Bela Banerjee* the court rejected the government's definition of compensation, it stated that compensation had to mean a "just equivalent", which the court said meant the full market value of the property taken. So the court sought to substitute a court-devised policy for a government-devised policy.

There are other court decisions and issue areas where the court's activities may be viewed as having initiated policy changes or new policy directions. Recently, there have been a number of important Supreme Court rulings in the areas of prison reform and prisoners' rights.[7] These decisions seem to have come not in response to new government policies, for in these areas there had been little recent government action. In these decisions, the court seems to have taken the lead and formulated some new policy. The court in these decisions has brought to the nation's attention a number of rather grisly and antiquated features of Indian prison life, has ordered the release of undertrial prisoners who had spent more time in prison awaiting trial than they would have been required to if found guilty and sentenced, has set new and higher standards for the treatment of prisoners including the kinds of work that can be required of them and the wages they must be paid, has ordered jail administrators to separate youthful offenders from older prisoners, has sought to eliminate brutality perpetrated by prison authorities, and has generally stressed the rehabilitative rather than the punitive aspects of incarceration. In this issue area, the court seems to have succeeded not only in placing prison reform on the nation's agenda of problems that need to be addressed, but in setting standards for how the prisons must be administered and how prisoners must be treated. In other words, the court appears to have been acting in advance of the more political branches in making prison-related public policy. Whereas in the area of property rights the Parliament-Executive was the leader in policy-making and the court the reactor-respondent, in this area of prison reform the roles apparently have been reversed. If the court's policy-making in the land reform area had a braking or restraining effect on the government, its policy-making efforts in this area of prison reform seem to have accelerated social change and placed the government in the position of having to do something it evidently did not have high on its agenda of reforms.

There may be still other areas in which the court has made policy with government acquiescence. A major illustration may be the protective discrimination policies for the Scheduled Castes and Tribes. Similarly, it seems that the court has played an important role in making industrial relations policy, again with the tacit approval of the government.

If all the court did was mechanically apply an absolutely unambiguous and perfectly clear Constitution or statute to an equally clear set of facts, the court would engage in little policy-making. But the experience of the past 30 years has demonstrated that both the detailed Constitution, and much legislation, include words and phrases the meaning of which reasonable politicians and reasonable judges often have interpreted differently, and this is a major reason, in addition to judicial review, why there is room for judicial policy-making. Judicial interpretation of both the narrow, literalist variety, as well as the "activist" variety can result in judicial policy-making. The lengthy Constitution seems to have increased rather than decreased the scope of judicial policy-making. Another label for judicial policy-making is judicial lawmaking, or judicial legislation. To the extent that judges make authoritative choices among competing solutions to public problems, they are consequently making public policy, *i.e.*, engaging in judicial law-making.

4. *Assigned and acquired political roles*: That the court would have an important role in the Indian political system was both understood and in large part predetermined by the members of the Constituent Assembly, for the framers discussed, debated, and ultimately made provision for judicial review. Thus judicial review is an explicitly assigned political role, for the provision for judicial review sanctioned the court's involvement in the on-going political process. The framers not only saw fit to confer upon the court the

power to annul legislative and executive actions, but by virtue of article 32 mandated that access to the court be easy and swift on matters most likely to involve the court in important and controversial political decisions, *i.e.*, the Fundamental Rights. There are many other areas in which the court has an assigned political role. The court's advisory jurisdiction is such an area, as is deciding who the elected politicians are, for in India it is within the domain of the higher judiciary to decide election disputes, of which there have been many dozens, involving a veritable who's who of the national and state political elite. Less explicitly, but reasonably inferred from the Constitution, the court has been assigned the role of guardian of the constitutional process, an extraordinarily delicate and important political role. It is noteworthy that the court has not evolved a self-limiting "political questions" doctrine.

In addition to these assigned political roles, the experience of 30 years has revealed other political roles that the court has assumed or acquired or perhaps has had thrust upon it because of certain characteristics of Indian politics. These may be designated acquired political roles. Perhaps the most significant political role the court has acquired since 1950 has been that of "opposition" to the government during the long period of Congress dominance. Except during the 1977-79 period, national elections have not produced numerically strong or very effective opposition to the winning party at the Centre. Of seven national elections, only once (in 1977) did an opposition party succeed in gaining more than eight per cent of the seats in Parliament. Into this void, the Supreme Court has either stepped or been thrust, depending upon the kind of lenses through which one views what has happened since 1950. Except for the 1977-79 years, and to a lesser extent the 1967-71 period, the most continuous and significant opposition to the government of the day has been provided by the Supreme Court. In the absence of significant opposition in Parliament, and of other institutional restraints upon the exercise of political power, the court has served as the most important constraint upon the government.[8] Many of the most notable defeats the government has suffered have been at the bar of the Supreme Court.

Perhaps the best way to conclude this brief discussion of the court as a political opposition is to ponder for a moment the question of what the Indian political process, and political and social life — indeed, the Indian political system — would have been like during the past 30 years absent the Supreme Court? Neither ideological approval nor disapproval of what the court has done is implied; whether one views the court as a progressive or reactionary force in Indian politics depends a great deal on the political orientation of the viewer. The Constitution sanctioned, the political context demanded, and the supportive culture has nurtured the Supreme Court's role of opposition to the government of the day.

Inputs

5. *Political environment*: The court always functions within a particular political environment, but one which has changed several times over the years. The *Habeas Corpus* decision, handed down in the teeth of the Emergency, surely is in part explained by the fact that the political context in April 1976 was extremely threatening to judicial institutions. And the *Dissolution* opinion a year later seems to be an excellent example of a decision affected by the dramatically changed political situation after the 1977 election.[9]

The prevailing political context may provide support for the court, or it may pose threats. The political environment within which the Supreme Court has operated during the past generation has, of course, undergone a number of changes. Concerning the matter of criticism directed at the court, hindsight enables us to see that the most tranquil period for the court was the Nehru period. Nehru, a real liberal democrat and a leader trained in the law himself, occasionally expressed his exasperation with the judges and some court decisions, particularly those dealing with property, but he can be described as one who did reveal a large measure of respect for courts and the judicial process.[10] What criticism there was of the court during his tenure as Prime Minister was directed mainly at particular decisions of the court.

A few years after Mrs. Gandhi came to power, the target of criticism shifted from particular decisions to the judges themselves, the best illustrations of which are the "committed judiciary" argument and the first supersession. By the time of the Emergency, criticism had escalated to attack, and the target of the attack had moved from decisions to judges to the entire higher judiciary. The major event of this third stage was the 42nd Amendment, an institution-threatening act that sought to eliminate politically important roles the court had been performing, and make the court subservient to the Executive.

6. *Legitimacy as a political resource*: Much of the power, authority, and general relevance of the Supreme Court in the Indian political system — indeed, the largest single reason why the court is an important political institution — is that the court has a reservoir of valuable, culturally provided, political resources at its command. The most important of these is legitimacy, which basically means support, respect, public acceptance — the power to command acceptance and support from the community for its various roles and decisions. The court is not strong and powerful because the Constitution makes provision for a strong court. In many other new

States, post-independence constitutions have "created" what their framers intended to be "powerful" judicial institutions, often endowing such courts with the power of judicial review. More often than not, such judicial institutions have proved to be weak, have long since collapsed, or have been emasculated by executives unwilling to be delayed or deterred by judges. Nor is the court in India powerful simply because it is in fact independent from the executive. Courts in Franco's Spain were independent, were not controlled by the regime, but had so little power and authority as to be of no noteworthy consequence in that authoritarian system.[11]

More important than the Indian Supreme Court's independence from the executive and formal power and authority, and without which the court could not be an important political institution, is the legitimacy it enjoys. It is this power of legitimacy that produced the public outcry when Shelat, Hegde and Grover JJ. were superseded, and that protected the court during the Emergency. In other words, legitimacy is more than respect, prestige, esteem and reverence. It is also power — political power, a political resource, enormously important political capital the court has at its disposal, without which the court's role in the political system would be minimal. If Indians were as skeptical and cynical about their Supreme Court judges as they are of their elected politicians, the court's political role would suffer. This legitimacy resource, manifest in the extent to which the political branches, the rest of the legal profession, and enough of the public will accept what the judges do as legitimate and accordingly deserving of consent and support, immeasurably enhances the political impact its decisions have both when the latter serve to confer or deny legitimacy to the actions of the Parliament and the Executive. In short, the quantum of the court's power and authority is related directly to the amount of legitimacy it possesses.

Paradoxically, a large part of the reason why the court has legitimacy and is therefore an important political institution, is that it is widely perceived as a *non*-political institution. The more the judges are perceived to be above politics, to be politically neutral and impartial and possessed of high integrity — the more they are viewed as different from ministers, legislators, and bureaucrats — the more political clout and impact they have.[12] The very characteristics of judges that so markedly differentiate them from other important actors in the political system enhance the power of the court and serve to make it an important political institution. To the extent that this legitimacy erodes, whether caused by activities of the judges themselves, the executive staffing the court with political partisans, or successful attacks by respected national leaders, the court's importance as a political institution will suffer.

7. *Politicization by outsiders*: The activities of actors outside the court can serve to politicize the court. The first supersession is the most obvious example of a linkage between politics and the court being accomplished by individuals outside of the court. That supersession, whether motivated by a desire to punish Shelat, Hegde, and Grover, JJ. or to reward with the centre chair a less senior judge who had sided with the government in major economic regulation cases and thus was considered friendly, introduced into the process of selecting chief justices an element of politicization that had not been present during the first 23 years. The supersession clearly demonstrated the government's acceptance of the view that judges have discretion and contribute to the making of public policy, and perhaps also its understanding that who is chief justice can make a difference in the kind of public policy the country benefits from or from which it suffers.

Further on the matter of appointments, the more the Executive is seen to interfere with the process of selecting judges — the more, *e.g.*, the Executive seeks to populate the court with partisans — the more the appointment process, and the court as well, is politicized. By these standards, the Supreme Court of India, compared with constitution courts elsewhere, has been only marginally politicized by the Executive. Both the government and various chief justices have stated that the latter is the pivotal figure in the process of selecting puisne judges, *i.e.*, that for most of the past 30 years, the Chief Justice has proposed the name of nominees, and the Government has chosen from this list and announced the appointments. Given the extensive power Indian judges have to affect politics and public policy, it is remarkable that the Executive has intruded so little in choosing judges. Of the world's constitutional courts, the Indian Supreme Court is among the least politicized by executive interference with appointments.

But this does not mean that political considerations are not present in the selection process, for the appointments of the past 30 years reveal that at least two types of representational considerations are evident in appointments. There is a "Muslim seat" on the Supreme Court, *i.e.*, communal representation is a factor in appointments.[13] And secondly, geographic representational considerations have been a factor in deciding from which High Court or region of the country a newly appointed judge will come. Both of these representational considerations are a variety of political consideration.

Short of utilizing political criteria at the appointment stage, the Executive may politicize the court by various other actions. Around the time of the *Bank Nationalisation* and *Privy Purses* decisions, the phrases "committed judiciary" and "social philosophy" of judges entered the vocabulary of Indian politics, and the use of such phrases increased at the time of *Kesavananda* and the first supersession. Such phrases carry thinly disguised political meanings, and are another illustration of actions by non-judicial actors that serve to draw the court into the vortex of politics.

Finally, the court may be politicized by the manner in which various non-official opinion leaders such as scholars, journalists, and other members of the nation's power elite speak and write about the court. With few notable exceptions, Indian legal scholars are Blackstonians, and have not treated the court as a political institution. The major exception is Baxi's new book.[14] For the vast majority of that large fraternity who write about the Supreme Court of India (including the political scientists), the court's activities and Indian politics are distinct phenomena that seldom intersect; for them, Supreme Court decisions and Indian politics pass like two ships in the night.[15] The same indictment applies to most Indian journalists, with the result that readers of descriptions of Supreme Court activities are understandably left with the impression that the court is exclusively a legal institution.

8. *Litigation as political action*: Both the kinds of individuals and groups who utilize the court, and the purposes for which they approach the court, suggest that the court may be perceived by segments of the population as an arena where political, social, or economic victories can be achieved. In other words, some groups (*e.g.*, property owners, businessmen) may view litigation as a form of political action. Litigation before a tribunal as powerful as the court is in effect if not in intent often a form of political action.

An earlier study revealed that the State (Central and State governments) was by far the largest category of litigant in the Supreme Court.[16] Of some two dozen categories of private parties who utilized the court, the businessmen category was four times larger than any other. Second-ranked were rural landlords. In the vast majority of disputes involving businessmen or landlords, the opposite party was some level of the Government. Businessmen won 43 per cent and landlords 41 per cent of these encounters (in all private party versus the Government litigation, the Government lost just under 40 per cent in the Supreme Court). During the period covered by that study (1950-67), neither businessmen nor landlords had fared particularly well at the hands of legislators. In the Supreme Court, both groups were rather successful. It is not unreasonable to conclude that these two groups view the court as either a primary or secondary arena for the preservation and defence, if not advancement, of their economic and political interests. Litigation, like legislation, is a stage in the accommodation of political and economic interests, and it comes as no surprise that groups or individuals which lose in the legislature would turn to the courts, powerful and independent as they are, in search of relief. In Indian party and electoral politics, all groups express their support and compassion for the "downtrodden". The latter are not found very often utilizing the Supreme Court; on the contrary, the court is an arena used mainly by those accused of being the "trodders".

9. *Judges as political actors*: A very different perspective from which to view the court as a political institution is that of focusing our attention not on the court as an institutional entity, but upon its judges as individuals, particularly upon the discretion they inevitably have and how they exercise this discretion in word and deed. This approach, which is in the intellectual tradition of "judicial behaviour" research, enables one to assess the extent to which the judges reveal in their decision-making behaviour political, social, or economic philosophies, and accordingly can be viewed as political actors. To the extent that judges reveal stable attitudes that differ consistently from those of other judges, the traditional explanation that judges simply go where the Constitution directs them is discredited.

It is too late in the day to cling to the old Blackstonian view of the judge as a value-free technician or legal wizard whose only task is to find the law and declare it. Judicial decision-making involves much more than the mechanical application of the Constitution or law to a factual situation in a detached and neutral manner. Judicial decisions often cannot adequately be explained by reference to the facts of a case and the relevant law, so mechanically applied. Were this not true — if judges had no discretion — there would have been no need for the "committed judges" argument, no reason for the two supersessions, no reason for the executive to transfer High Court judges during the Emergency, no explanation for most divided decisions, and no reason for all the constitutional amendments that have sought to limit judicial discretion.

Certain parts of the Constitution literally require that judges exercise discretion. Article 19, for example, guarantees the citizens seven freedoms, but permits legislators to impose "reasonable restrictions" on these rights. When judges must pass upon the reasonableness of restrictions, they cannot escape exercising their own discretion, and the main point about this discretion is that it involves subjective choices and brings into play the perceptions, backgrounds, life experiences, values — the personal beliefs — of the judges.

Because they have discretion, the judges' "social philosophy" of which Sastri J. once spoke (*Madras* v. *V. G. Row*), and their "value preferences" of which Chandrachud J. spoke in the *Dissolution* case are factors that enter the decision-making process. Some measure of the extent to which these factors intrude can be observed by application of a number of research strategies, the most scientific of which employ various statistical tests to quantified Supreme Court decisional data. Particularly revealing of the attitudes and values of individual judges is their voting behaviour in divided (non-unanimous) decisions. The more dissensus there is, the more hard evidence there is of discretion being a real factor in decision-making by the court. When various judges disagree and demonstrate consistent patterns of voting behaviour in the choices they make in these divided decisions, one acquires evidence not only that non-legal considerations are operative, but that judges, like other political actors, have political, economic or social philosophies that are influencing their own behaviour.

Social scientific research has demonstrated a propensity on the part of some judges to support the government consistently in litigation pitting the individual/private interest versus the State (Kania and T. L. V. Ayyar JJ. in the 1950s, Gajendragadkar and Hidayatullah JJ. in the 1960s), while other judges are equally consistent in rejecting the government's position and demonstrating support for the individual/private parties (Mahajan and Bose JJ. in the 1950s, Subba Rao and Shah JJ. in the 1960s).[17] The extent to which this "pro-government" or "anti-government"[18] (voting) behaviour is conscious or subconscious is largely unknown, but also entirely irrelevant to the point being made here, *i.e.,* that judges have discretion, use this discretion, and reveal in their voting behaviour a degree of attitudinal consistency that permits one to infer the entry of their personal political, social or economic philosophies into the decision-making process.

Whereas the findings of the judicial behaviour research discussed in the preceding paragraph are derived from inferences drawn from consistent voting behaviour, quite a number of judges have in spoken and written word revealed attitudes and values about important political issues. The descriptive adjectives Subba Rao J. employed in describing the Fundamental Rights ("sacrosanct", "inviolable", "inalienable", "paramount", "transcendental") are most revealing about his political philosophy of individualism. More recently, many of the words and phrases employed both on and off the Bench by Krishna Iyer J. are certainly revealing of political, social and economic views evidently strongly held by that justice. Judges whose words and deeds suggest an intent to advance their own personal vision of what would be good for the country reveal what we usually label as political attitudes.

10. *Chief justices as special wielders of power*: The decision-making rules and norms of the Supreme Court place in the hands of the Chief Justice the power to bias the decision-making process and, accordingly, the decisional output of the court. Not only have chiefs played a major role in the appointment process, but the chief justices

have at their disposal the power to affect the outcome of litigation by virtue of the fact that it is they who decide which of the several simultaneously functioning division benches a puisne judge is to be assigned. The court very rarely sits *en banc*. Usually there are three or four subsets of two-to-five judges each which decide cases. When a tribunal's work is divided among several benches and the Chief Justice has the authority to determine who sits on each bench, the choice of which judges are to hear which cases can be a critical factor in the outcome of the litigation. Because of the divisional bench system and the absence of an objective scheme (*e.g.*, random assignment) for assigning puisne judges to various panels, Indian chief justices are in a position to dominate their courts to a great degree. They have leadership tools of vast potential importance.

It is reasonable to assume that chief justices, all of whom have served as puisne judges on the court, will be aware of the value preferences or "social philosophies" of their colleagues, as revealed in actual decisions or in informal conversation among the judges.[19] Decisions in recent years dealing with the death penalty have revealed some disagreement among the judges concerning this most ultimate penalty. In deciding whom to appoint to benches which will consider capital punishment appeals, the exercise by the Chief Justice of his bench assignment prerogatives will effectively predetermine the outcome of the appeal.

Earlier reported research provides rather powerful evidence that at least some chief justices have led their courts along lines consistent with their own value preferences.[20] Of the nine chiefs who served during the 1950-67 period, the most "individualist" (*i.e.*, the most inclined to support the individual/private party's claim *vis-a-vis* the government) in relation to all others with whom he served while a puisne judge, was Subba Rao J. Prior to moving into the centre chair in 1966, Subba Rao in his eight years as a puisne judge gained a reputation as an inveterate defender of the Fundamental Rights and an intractable foe of government subtractions from these rights. He also dissented more (almost always in support of the individual's claim in a decision in which the majority of his colleagues supported the State's position) than any other Supreme Court justice before or since his time. But during his nine and one-half month tenure as chief, Subba Rao never found it necessary to write a dissenting opinion, nor was he once in the minority in the 77 reported decisions in which he as chief participated. Furthermore, during his tenure as chief, there were 167 cases decided in which the individual/private party was pitted against the State. Whereas the individual/private interest won 39.6 per cent of all the 2138 encounters between 1950 and 1967, in Subba Rao's C.J.'s court the individual/private interest won 49.7 per cent (83) of the 167 cases.[21] Finally, a larger percentage of the legislation and ordinances attacked as unconstitutional was in fact declared unconstitutional by benches constituted by Subba Rao C.J. than by any of his eight predecessors except Mahajan C.J., who, not surprisingly, was second only to Subba Rao C.J. (among those who later served as chief) in his own support for the individual claimant when he (Mahajan) was a puisne judge.[22]

As powerful as this kind of evidence is, scientifically it falls short of demonstrating that Subba Rao C.J. stacked particular benches with attitudinal cohorts, for in compiling those data the bench assignment question was not directly addressed. According to Baxi, Chief Justice Ray excluded certain senior judges from the hearing of stay petitions of the State against detenues who had secured some relief at the High Court level.[23]

Evidence such as this certainly suggests that the Chief Justice of India is far more than simply the first among equals. To the extent that chiefs use such power to manipulate bench assignments along lines consistent with their own preferred outcomes, the decision-making process is politicized by the chief.

Conclusions

This paper has sought to demonstrate that the Supreme Court, in a variety of analytically distinct ways, can be viewed as a political institution. Although ten separate dimensions were considered under three separate headings, the interrelationships are apparent. Thus, *e.g.*, the more politically significant the court's decisions (outputs) are, the more visible the social, economic, and political philosophies of the judges are (conversion process), the more the executive's attention is drawn to the appointment stage (an input) and to the backgrounds of those under consideration for appointment to the court.

The intent was not to suggest that the court is not a legal institution, or that there are no differences between the court and the Parliament and Executive. Of course there are important differences between the court and those other institutions. But there are striking similarities as well, and these have been emphasized. Nor was the intent to propose a cynical view of the court, or to sweep away some of the myth and make-believe that surround the court and its activities. Some of a society's myths are likely to serve a useful purpose and, if they are to be attacked, it is better that insiders rather than foreigners do this. It was the intent of this paper to offer what is hoped is a more realistic view than is conventionally provided about what the Supreme Court is and does. By viewing it as a politicial institution, its role in the Indian polity is brought into clearer focus.

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After a draft version of this paper was prepared in 1979, the author had an opportunity to read Professor Upendra Baxi's brilliant, pioneering, and provocative book entitled *The Indian Supreme Court and Politics* (1980). Although Baxi's book and this paper are more different than similar, the author gained new insights from Baxi's work, and these are reflected in this final version of this paper.

1. See especially David Easton, *A Framework for Political Analysis* (1965) and *A System Analysis of Political Life* (1965). Systems analysis is employed by Sheldon Goldman and Thomas P. Jahnige in *The Federal Courts as a Political System* (2nd ed. 1976).
2. Many of my thoughts about the extent to which courts are political institutions were stimulated by Professors Walter F. Murphy's and C. Herman Pritchett's *Courts, Judges, and Politics: An Introduction to the Judicial Process* (3rd ed. 1979). My intellectual indebtedness to them is apparent at several points in this paper.
3. Much has been written of the tensions generated by the exercise of parliamentary power and judicial power, perhaps the best of which is Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty* (1976). In political systems where there are independent and powerful constitutional courts (and there are not many of these), tension is inevitable. Often overlooked is the point that such tension can be applauded rather than labelled as dangerous, for one result of the tension is the limiting of power.
4. I do not mean to underestimate the Indian voter, for the votes cast in the 1977 election in particular not only limited the exercise of political power, but in as spectacular a fashion as the world has ever witnessed, caused a powerful government to depart. My point is that the voters can act as limiters of political power only occasionally through elections, whereas the Supreme Court has functioned as a limit-setter in continuous session.
5. Gadbois, "Indian Judicial Behaviour," (1970) V *E.P.W.* Nos. 3, 4 & 5 140-66, 153. Data from subsequent years have not been compiled.
6. Full compliance and implementation of Supreme Court rulings are probably quite another matter. A decision may not be rejected, but the extent to which bureaucrats and elected officials actually take the steps necessary to implement it is problematical. Research on compliance and impact is long overdue in India.
7. See, *e.g.*. *Mohd. Giasuddin* v. *State of Andhra Pradesh*, (1977) 3 S.C.C. 287; *Hiralal* v. *State of Bihar*, (1977) 4 S.C.C. 44; *M. H. Hoskot* v. *State of Maharashtra*, (1978) 3 S.C.C. 544; *Inder Singh* v. *State (Delhi Administration)*, (1978) 4 S.C.C. 161; *Lingala Vijay Kumar* v. *Public Prosecutor*, (1978) 4 S.C.C. 196; *Sunil Batra* v. *Delhi Administration*, (1978) 4 S.C.C. 494. *Cf.*, Baxi, *Indian Supreme Court and Politics* at 234-45.

8. For a related argument, see Baxi, *id.* at 16-26, particularly 19-21 in which Baxi eloquently establishes the political environment of *Golak Nath*, and observes that "The Court intervened to ensure that second generation politicians would not make fundamental rights into playthings. In this, the Court was playing a frankly oppositional role." *Id.* at 20.
9. Baxi, *id.* at 40. Of the post-Emergency political context, Baxi argues rather persuasively that the *Dissolution* decision was dictated by the dramatically changed political situation after the 1977 election, and was an "altogether political" decision, "a political judgment and it should be frankly be recognized as such." *Id.* at 131, 133.
10. *Cf.* Alice Jacob, "Nehru and the Judiciary," (1977) 19 *J.I.L.I.*, 169-81.
11. José J. Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," (1975) 9 *Law and Society Review*, 475-96.
12. These remarks apply not only to judges in their formal roles as judges. A ubiquitous feature of Indian political life is the commission of enquiry, often established to investigate a politically flammable issue. It is judges (retired or active) who staff these commissions, for the very reasons just mentioned.
13. When Fazl Ali J. the first of the Muslim judges, left the court in 1952, he was replaced immediately by Ghulam Hasan J. When the latter died in 1954, the vacant Muslim seat was filled by Syed Jafer Imam J. As the size of the court has increased, there have been periods when more than one Muslim was serving on the court. *Cf.* Gadbois, "Indian Supreme Court Judges: A Portrait," (1968-69) 3 *Law and Society Review*, 317-36, 324-25.
14. Rajeev Dhavan's extensive writings also generally treat the court as something more than an exclusively legal institution.
15. Rajni Kothari, India's foremost political scientist, does not mention the Supreme Court in his *Politics in India* (1970).
16. Gadbois, "The Supreme Court of India: A Preliminary Report of an Empirical Study," (1970) IV *Journal of Constitutional and Parliamentary Studies*, 33-34. In this quantitative study, the first 3272 Supreme Court decisions were systematically analyzed.
17. Gadbois, "Selection, Background Characteristics, and Voting Behaviour of Indian Supreme Court Judges, 1950-1959," in Glendon Schubert and David J. Danelski (eds.), *Comparative Judicial Behaviour* (1969), 221-51; "Indian Judicial Behaviour," *supra* note 5; and "Supreme Court Decision Making," (1974) 10 *The Banaras Law Journal*, 1-49.
18. These labels are used simply to *describe* the observed behaviour, and not to *explain* or *account* for it. Precisely why these judges voted as they did remains largely an incompletely answered question.
19. Former Chief Justice S. R. Das provided evidence of this in his responses to the encomia at the farewell dinner marking his retirement. See (1959) *Supreme Court Reports* xv-xvi.
20. Gadbois, "Supreme Court Decision Making," *supra* note 17 at 24-34.
21. Gadbois, "Indian Judicial Behaviour," *supra* note 5 at 166.
22. Gadbois, "Supreme Court Decision Making," *supra* note 17 at 26.
23. Baxi, at 44-45.

17

JUDGES, STATE AND SOCIETY IN INDIA

R. SUDARSHAN

The Indian legal system offers a fertile field for the exploration of the relations between law, state and society from a multidisciplinary perspective. Its basic affinities are with Anglo-American law and yet it operates in a distinctively Indian context. If Western law was purely a colonial graft designed for colonial purposes, then one would have expected Independent India to abandon it in favour of an indigenous system of law. But as Marc Galanter points out, the "attachment to Anglo-Indian law (and its American-style constitutional overlay) runs deep".[1] Neither the attempts at establishing a system of *nyaya panchayats*, nor the Emergency of 1975, which offended the liberal constitutionalist view of the legal order, signified a departure from these forms of law. The consensus over the forms and institutions of the colonial state in the Republic is striking. The Constitution of India took much of its spirit and most of its letter from the British Government of India Act of 1935. This suggests that an explanation for the durability of a Western-style legal system is to be found in the evolution of the Indian state and the socio-economic context in which it operates. Unfortunately, prevailing fashions in each of the disciplines relevant for the development of a theory explaining the interactions between the legal, economic and social systems have precluded the emergence of an integrative approach.

For too long economists and economic historians have tended to regard the law and institutional processes as no more than mere backdrop to their analyses of economic forces. Lawyers, on the other hand, have regarded their discipline as an isolated field of inquiry. In political studies, where one would expect a vigorous pursuit of the analysis of normative orders and institutions, influential writers such as Robert Dahl argued for a departure from traditional concern with institutions in favour of an approach emphasising "social forces".[2] This led to a somewhat exclusive focus on behaviourism and empiricism in the attempt to make the study of politics a "science". It rendered the study of legal rules and constitutions unfashionable. Even in sociology, a discipline growing out of the classics of Weber, Durkeim and Marx, whose insights into the legal system were rich and profound, the law became, in Talcott Parson's words, "an intellectual step child".[3]

It is only recently that a convergence between the interests of these disciplines has begun to emerge. Socio-legal studies and the sociology of law have come into prominence lately.[4] There is now a renaissance of interest in legal history. The contributions of various scholars, despite their different ideological orientations, have shown that a focus on the law can make historical accounts of economy and society richly rewarding.[5] There is, however, no complete model available for charting all the complexities of the interactions between law, economy and society. Serious methodological difficulties still remain.

Generalised conclusions, such as Morton Horwitz's characterisation of American law being instrumental for the promotion of economic development in the nineteenth century before crystallising its advantages with the onset of formalism, are liable to be criticised on the basis of legal detail and case studies.[6] But a case study methodology, while capable of illuminating first-order links between developments in different branches of the law and different sectors of the economy, and bringing into the foreground events and personalities that shaped the actions of courts and legislatures, does not yield a general theory of the relationship between law and society. Case studies are analogous to partial equilibrium analyses in economics which cannot be simply aggregated into a general equilibrium theory. The best that can be done in the present state of knowledge is to proceed critically, attempting to overcome inadequacies in existing approaches, and move toward criteria for a "middle range" theory that is neither a collection of discrete case studies nor a general theory.

Such a "middle range" approach is feasible because the law can be seen to represent general principles legitimising certain norms, institutions and practices. Struggles in society over the distribution of advantages and disadvantages will be reflected in changes in the law through control over the political authority of the state. Viewing the courts and legislatures as apparatuses of the state, and connecting their actions and inactions to the wider context of the economy and society, can provide insights into both the effect of the legal system on society, and the reciprocal effect of conditions in society on the legal system. On the basis of such a theory, it may be argued that the legal system in India survives as it does, because the colonial context of its development led to a particular configuration of classes which inhibits forces seeking to alter it. In what follows we shall present a brief critique of some existing approaches to the study of law in India and develop the premises of an alternative approach which can substantiate this argument.

The liberal-legalist approach

The conventional approach to law in India is well exemplified in the work of H. M. Seervai whose book on constitutional law is a basic text in most law schools.[7] It deliberately eschews references to the wider social and economic context in which judicial decisions are made because of its liberal-legalist premise that adjudication must be free from politics. This follows from the classical liberal view that there can be consensus of an objective kind only over "facts", but "values" are essentially contestable. The judge is regarded as well equipped to apply the law to determinate "facts"; disputes involving "values", however, are best left to a legislature legitimated to resolve them by a notion of prior consent expressed through some mode of representative democracy. Hence politics, understood as the activity of resolving such conflicts, is the province of the legislature, not the judiciary.

Several liberal scholars have expended considerable efforts attempting to articulate an essential difference between judges and legislators.[8] Although many of them recognise that a strict distinction between them on the criterion that the former are mere rule-appliers and the latter are the rule-makers is not tenable, the problem of reconciling judicial creativity and the theory of representative democracy flows from the premises of liberalism stated above. Whether it is argued that judges have only a limited area of discretion, or that they do no more than 'balance' interests which conflict, or that they engage only in "reasoned elaboration" of democratically legitimated purposes implicit in the existing body of rules, it cannot be denied that judicial decisions have an inevitable political element requiring justification over and above legislative sanction. This makes judges liable to be held accountable for the consequences of their decisions in their own right. Yet liberal legalism refuses to countenance judges as political actors; in terms of its premises, knocking the judicial bench is *not* as proper a political activity as knocking the front bench.[9] Reticence regarding the political role of judges is reinforced by professional concerns seeking to preserve their distinctive monopoly. The upshot of liberal legalism has been a general inhibition against inquiry into the larger dimensions of the relationship between law and society on the part of most lawyers. A political consequence of this approach is the creation of a metaphysic in "the law", serving the *status quo* interests of certain powerholders by warding off attacks in the name of the "rule of law".[10]

The political jurisprudence approach

The Realist school in jurisprudence was a welcome development-making way for the political jurisprudence approach. C. H. Pritchett was one of its pioneers and it is premised on the view that "judges are inevitably participants in the process of policy formation; that they do in fact 'make law'; that in making law they are necessarily guided in part by their personal conceptions of justice and public policy; that written law requires interpretation which involves the making of choices; that the rule of *stare decisis* is vulnerable because precedents are typically available to support either side in a controversy".[11] Empirical analysis of judicial behaviour is a corollary of this approach. Its chief characteristic, as well as its limitation, is the central importance it accords to the judge and judicial power.

The contributions of both George Gadbois and Upendra Baxi on the Indian Supreme Court belong to the political jurisprudence tradition. Gadbois adopted C. H. Pritchett's proposal that judges be conceptualised as a "small decision-making group, whose voting and opinion behaviour could best be explained in terms of imputed differences in the attitude of the individual justices toward the issues of public policy present in cases which reached the Court for decision".[12] By assuming, *a priori*, that the determinants of judicial conduct are to be found in factors *internal* to the judge, the implication of such studies is that if a different type of judge were to be appointed to the courts, the consequences for society, by that fact alone, would be different. The possibility that the legal form itself, the nature of the legal system and the kind of litigation brought to them may all condition consequences in more important ways, regardless of who the judges are, is not entertained and explored. Besides, serious methodological difficulties in quantitative analysis forced Gadbois to conclude that "the point at which significant leaps forward in the direction of a better understanding of judicial attitudes and values, via analysis of judicial voting behaviour" may have already been reached.[13]

Baxi adopts a similar voluntaristic conception of judicial power in his book on the post-Emergency court.[14] It is an invitation to judges to be self-conscious of their power as political actors, to risk "controversy rather than irrelevance". He endorses a judge's description of the court as "the last resort for the oppressed and the bewildered",[15] adopting a broadminded conception of judicial power which could enable judges to transcend class conditioning and practice different kinds of politics.[16] His hopes for a new "constitutional dawn" through the actions of judges flow from one-sided conception of judicial power; it could not rest merely on the "populism" recently espoused by some judges; all political parties in India are similarly populist.[17]

While both Baxi and Gadbois rightly adopt an agency concept of power, giving roles to human agents rather than abstract structures, they fail to be sufficiently sensitive to the dialectic between power and structure.[18] Being inadequately emancipated from the premises of liberal legalism, they fail to regard the judiciary as an apparatus of the state subject to all the structural constraints faced by the Indian state. An exaggerated vision of judicial possibilities for the removal of disjunctions between high constitutional ideals and the painfully obvious features of Indian society is the result of a one-sided, one-dimensional conception of judicial power. The 'hidden face" of power, consisting in organisational features involving the "mobilisation of bias" where some issues are organised into judicial politics while others are organised out, escapes scrutiny in their approach.[19] If these wider dimensions of power, including the ideological dimension of law implicit in Gramsci's conception of hegemony,[20] are to be captured, a judge-and decision-centred approach to the understanding of law and society must be transcended.

The constraints of tradition approach

In contrast to Gadbois and Baxi, Rajeev Dhavan in his extensive writings on the Indian Supreme Court has a more modest view of the extent to which judicial will can be conjoined with possibility.[21] The major structural constraint on judicial power is identified by Dhavan as consisting in what he calls the "traditional system and traditional network of relationships".[22] His approach, which to a large extent he shares with J.D.M. Derrett, has the merit of taking into account historical specificities of the Indian legal system and providing explanations, not just in terms of jurisprudential possibilities, but in the context of sociological knowledge concerning India.

A critique of this approach may be advanced on the grounds that the concept of "tradition" cannot bear the explanatory load placed upon it.[23] With characteristic conciseness Derrett defines "tradition" as "that element in the present which represents (and re-presents) the past. Whether or not people are conscious of it, whether or not they accept it, a people's past, when represented in their present is their tradition".[24] This conception of tradition is dynamic in that "what is traditional is not the past unchanged, but the past represented by a lineally derivative representative. Continuity subsumes, if it does not always presume, change".[25] So defined, "tradition" serves for Derrett as an independent variable capable of explaining the emergence of particular types of legislation, the efficacy of its implementation, the role of the courts, and, by implication, throw light on problems concerning the creation and distribution of wealth. Derrett asserts, "elements in Indian law which are traditional have in a sense stood the test of time and are likely to work, either as they were intended to, or in some other more or less predictable way. Elements which are not traditional will either be distorted to perform functions for which they were not intended, or will be failures".[26] For Derrett, when the Supreme Court resists legislation on land reforms and the imposition of ceilings, it is responding to the stirrings of "tradition" in the face of developments which are "prominently and unquestionably hostile to Indian tradition".[27] According to him, there is a crisis in the Indian legal system because "tradition" has caught up with its liberal-legalist framework.[28] The notions of the independent judge beyond the control of the ruler, and the "rule of law", being antithetical to that tradition, tensions develop which progressively destroy the substance of Western forms of law, if they existed at all. These tensions are expected to persist, while "law" as the West knows it fades, until an Indian jurisprudence more faithful to the elements of Indian tradition emerges.

If Derrett is only drawing attention to what can be called the hegemonical force of certain values, beliefs and practices, its truth must be acknowledged. But he does more than that, and makes "tradition" the explanation for conditions in Indian law and society. There is an implicit Parsonian assumption that "tradition" itself, representing dynamic continuity, requires no explanation.[29] The point, simply put, is that "tradition" cannot *explain* behaviour; it is the explicandum, not the explanation. Or as Barrington Moore puts it: "Culture, or tradition — to use a less technical term — is not something that exists outside or independently of individual human beings living together in society. Cultural values do not descend from heaven to influence the course of history. They are abstractions by an observer, based on the observation of certain similarities in the way groups of people behave, either in different situations or over time, or both. Even though one can often make accurate predictions about the way groups and individuals will behave over short periods of time on the basis of such abstractions, as such they do not explain behaviour. To explain behaviour in terms of cultural values is to engage in circular reasoning".[30] To provide adequate explanations, it is therefore necessary to investigate the concrete interests and patterns of dominance that sustain cultural values and exploit "the traditional network of relationships."

In addition to this methodological flaw, there are difficulties in determining what is to count as "traditional". On the evidence of historians it now appears that institutions such as the village community, the extended family, and different modes of caste identification, which have been taken to be traditional, were themselves the product of change, assuming their special characteristics only in the nineteenth century under colonial rule.[31] Identities of ethnicity, language and caste assumed salience in result and rhetoric when they found definitions in legal codes embodying the prospect of state patronage. The process is similar to that witnessed in the present day when ingenious attempts are made to swell the category of the "backward caste". It could indeed be said that a great deal of what passes for "tradition" in India today was the creation of the British colonial state.

The difficulties in identifying "traditional elements" in specific structural, ideological and functional terms, vitiate the analysis presented by B. I. and S. H. Rudolph.[32] They seek to provide a theory of social change in which "tradition and modernity are seen as continuous rather than separated by an abyss . . . dialectically rather than dichotomously related". They take the role of caste associations in the working of democracy, features of Gandhi's personality, and the Brahminical norms incorporated in the creation of an all-India system of law, as "sectors of traditional society that contain or express potentialities for change".[33] The Rudolphs fail to examine *why* certain features from the past have persisted, and what economic and political circumstances have made their maintenance possible. They argue in terms of the latent adaptability of what they take to be "tradition", and make its survival in the present the proof of such adaptability. The circularity in this reasoning is obvious.

Where Derrett, emphasising the structural and ideological components of what he authoritatively identifies as "tradition", predicts that attempts to modernize India along Western lines are doomed to flounder against the intransigence of this "tradition", the Rudolphs are prepared to see a radical transformation in India where modernity and tradition "infiltrate and inform each other". They have the bigger problem of having to explain how the structural and functional features of an institution can change radically and yet the institution continue to remain "traditional". As Richard Fox puts it: "The successive *avatars* of Vishnu are indeed continuations of his Self, but they are also new forms with different functions suited to different world conditions and epochs".[34]

These remarks indicate that an analysis of the relationship between law and society in India in terms of the dualisms of "tradition" and "modernity", or "Western" and "Indian", may not be very fruitful. Although Dhavan conducts his analysis in these terms, he correctly recognises that, contrary to the notion that under British rule India moved from "Indian status to British contract', the British "did not really establish a completely Western system of law and justice", owing to the "risk of creating political and social tensions which would not contribute to the stability of the Empire."[35] If indeed, as Dhavan suggests, it was the "Indians themselves who established a Western system of law and justice after the British had left India", it is a phenomenon to be explained not so much on the basis of some paradoxical tradition, but in terms of structural constraints and socioeconomic pressures in present-day India. In so far as these factors have emerged out of a colonial past, the weight to that history is bound to be felt in the present.

Towards an alternative approach : Some essential premises

The implications of the foregoing critique of some of the literature on Indian law and society for an alternative "middle range" approach may now be summed up.

First, the law cannot be regarded as an isolated field of inquiry, separated from the political and economic features of the rest of society. It must be viewed as the product of the actions of legislators, government officials, and judges, acting in the context of pressures generated in society. These actions carry important ideological components in terms of the presuppositions, justifications and rationalisations made by those who create the law. Thus the law is capable of making people *believe* certain things at the same time that it can make them act or not act in certain ways.

Second, the judiciary must be conceptualised not as an independent entity standing above the state, but as part of the state apparatus. The courts, therefore, are part of an "arena in which socioeconomic struggles are fought out".[36] In the course of these struggles, the actions of one set of state agents can affect the degrees of freedom available to other state agents, and thus of the state taken as a whole. The extent to which the state is autonomous of the class interests in society must be established on the basis of evidence; its autonomy, relative autonomy, or subordination to dominant classes cannot be assumed *a priori*.[37]

Third, the conception of power adopted must be one of agents, not structures; these agents are conceived as engaged in a constant dialectic between power and structural constraints on their power. Their nature is consequently both active and structured.[38] Motivations for action on the part of agents cannot be taken for granted on the basis of membership in a particular class, but must be explained in terms of their perception of their position, and the possibilities open to them.

Fourth, it is a basic premise of our approach that the class context in which the state operated is the result of particular relations of production. These have both an economic and a social dimension.

The former relates to the ownership and control of the means of production; the "social" value of property is a function of a number of factors, including the means of administration, political control, the division of labour and its control, as well as forms of exchange, circulation, distribution and consumption of the social product. It is this complex of factors which determines who the dominant classes are and who the dominated. The legal process plays an important part in the definition and value of property, for as Justice Jackson once put it, "only those economic advantages are 'rights' which have the law back of them".[39] Hence conflicts originating in the relations of production find expression in changes in the law.

Finally, the extent to which the law is created and moulded by class interests, and the extent to which it, in turn, affects relations of production is an empirical question. Although on the "base-superstructure" model of Marxist theory, the legal super-structure cannot affect the economic base, this is a misunderstanding of Marx's metaphor.[40] Marx himself has written of the two-way interaction. His discussion of the English Factory Acts, for instance, includes an account of both their sources in class relations, and their subsequent effect in inducing changes in technology.[41] Similarly, his account of the transition from feudalism to early capitalist production emphasises the role of the law in changing production relations.[42] The implication of this premise is that struggles for changes in the law are not mere epiphenomena, but matter very much for the classes involved.[43]

Taken together, these premises constitute the outlines of an alternative approach to the study of law, state and society which overcomes the deficiencies pointed out in some existing approaches. A full-fledged theory cannot be provided here. What follows is a highly compressed account of the evolution of the Indian state and the role of law, providing an account which is consistent with the premises set out above.

The Indian State and its class context

Many writers recognise that the state today cannot be regarded as the instrument of any single class.[44] Its colonial antecedents left the state to continue mediating between the conflicting interests of a dominant land-owning class on the one hand, and a powerful bourgeoisie on the other. Both these classes are in themselves heterogeneous. The former consists of landlords with substantial holdings who cultivate the land either on "capitalistic" lines with hired wage labour or continue "feudalistic" production with tenancy and share-cropping arrangements. Many of these landlords are also involved in money-lending and trade. The latter consists of monopoly business with interests spread throughout the country, small urban businessmen in control of single industries and limited regional base, various professional elites including lawyers, doctors, and the members of the state bureaucracy. The natural subordinates to these classes are the rural landless labourers, petty traders, the urban workers, some in secure employment and others unemployed or only intermittently employed. The dominant classes, as broadly conceived here, are restrained from pushing their interests too far to the detriment of each other, as neither can afford the risk of a collapse in the stability of the political base. The value of the property they control depends on such stability. Hence the support for the state in its present form is premised on an alliance between landlords and the bourgeoisie, and the constraints on state policy arise from the conflicting interests of these two classes.[45] The international context in which the state functions also presents constraints on its power. It is this class context which, on the one hand, weakens the state by seriously limiting its ability to raise resources, and, on the other, converts state institutions into an arena in which compromises between the conflicting class interests are worked out. It has resulted in a situation which has been variously described as one of "dynamic immobility" or as displaying "the paradox of static change".

How did such a state come into being? A perceptive account of its evolution with particular focus on the law is given by D. Washbrook.[46] His work is particularly valuable from the point of view of the theoretical premises stated above. It provides an answer to the persistence of "traditional" elements in Indian law by explaining how those features of the law were articulated to the purposes of the colonial state. They persist more as a consequence of state policy than due to the alleged intransigence of an "oriental tradition", essentially inert and comprising of values and beliefs of an unequivocally ancient sort.

In the earliest period of colonial dominance, the law was characterised by an emphasis on individual property and free market relations, a product of the Permanent Settlement, in the realm of public law, while the personal law of the population was left unchanged. The law was thus Janus-faced, incorporating both the possessive individualism of the free market and the contradictory elements of the Hindu empahsis on property as a communal trust. The explanation for this state of affairs, where the British failed to successfully replace "Indian status" by "British contract", is to be found in the structural constraints facing the "company state". The state was content to continue the pre-colonial revenue system, while pitching its revenue demands much higher and reducing several redistributive and investment functions such as the provision of *taccavi* loans and assistance for irrigation. The production of cash crops was its principal source of profit. But under conditions of land surplus and depleted population in the wake of wars, famines and cyclones, the prospects for producing for the market were severely limited. The state was content to continue the cash demand revenue system forcing market sales, and relied on local notables tempted by inams, village offices and other corporate tenures, to maintain production and hand over the revenue to the state. Its public law essentially serviced metropolitan business, while the personal law of the Hindus, with its extended liabilities for debts contracted by individual members of the joint family, served the state and mercantile capital by providing good security for debts. According to Washbrook, "the first phase of colonial rule subjected India less to the rule of property and law than to that of bureaucratic despotism and state monopoly".[47]

During the period from the middle of the nineteenth century till the First World War, objective conditions for a competitive market economy emerged with population pressures increasing the use value of land, rising prices, railway development, and the dismantling of the company's monopoly controls. A number of developments in the law signified a response to these conditions, including an expansion of the legal system, reduction in litigation costs, and streamlining the appeals procedure. By facilitating rent collections, discouraging community rights of restraint on land alienation, repealing usury laws, enabling acquisition of ancestral land to meet debt liabilities of individual joint-family members, better documentation of title, releasing as freehold property land tied to various inams, abandoning caste related assessments of revenue, and turning over public trusts from state control to semi-private corporations, the law, as Washbrook puts it, "began to alter its character and to conceive the rights involved in property much more in terms of private ownership and use".[48] These developments, however, did not go very far in altering the contradictory nature of law.

In 1864, the "assumption" of Hindu law by the courts, dispensing with the service of pundits, made it more rigid. The state set its face against interference with religions and social practices even when support for reforms was strong. Improved access to courts appears to have only strengthened the rights of the joint family. In addition to the conservatism in judge-made law, Washbrook notes that statutes introduced new forms of constraint. The steady stream of *tenancy* laws "represented the first stirring of that logic which, in North India, was to bring about a redistribution of property right from large zamindars to small holders and was to reach completion only with zamindari abolition in 1951".[49] The state was agitated by fears of the consequences of rising indebtedness, dispossession of zamindars and the growth in the power of the money-lender. Responding to these fears, the revenue administration, contrary to law, restored confiscated villages, the Court of Wards stepped in to protect many encumbered estates, and legislation appeared in Bombay and Punjab restricting the alienation of land.

There were a number of elements in Indian society which were critical of the conservatism in the law and its consequent effect on curbing the penetration into the countryside. Landholders' associations made demands for improvements in their right to property, some mercantile capitalists took capital out of India, and the Congress spoke up for creditors denied access to land. Contrary to the image of "traditional" inertia, there is evidence of considerable innovation. Washbrook notes that "the raj itself was resisting these pressures and was concerned to try and hold up the existing agrarian structure".[50]

The result of these contradictory aspects of colonial law was to confine capital to "relations of rentierism, commodity speculation and short-term usury".[51] Productive investment in agriculture suffered while profits from land and trade went elsewhere. This left agriculture exposed to the risk of crop failure and unresponsive to the market. Control of production remained in the hands of small farmers whose capacity for commercial enterprise was severely subjected to external constraints in the shape of inadequate investable surplus, lack of state support, and too high a risk involved in mortgaging valuable land for large-scale and long-term loans. Thus, as "the state steadily withdrew the coercive pressures which, in the past, had whipped agrarian society into servicing the market and left the development of production to the 'free' interplay of class forces, so it was helping to create a class structure premised on perpetual economic stagnation".[52] "Under-development" theorists argue that the preservation of such a 'quasi-traditional' mode of production was deliberate and most conducive to the interests of metropolitan capital.[53] Washbrook counters this view with an emphasis on the structural constraints faced by the colonial state restricting its ability to transform the structure of the economy, even if such a transformation was more profitable from the point of view of metropolitan capital.[54] The details of this argument need not be gone into here; it is sufficient to note that colonial law was very much at the centre, both responding to, and shaping the relations of production. It helped the colonial state hold the balance between class interests for the sake of its own survival. During this period, Washbrook concludes: "The law pursued a *modus vivendi* between all the parties contending for the production of the land, helping capital to extract some level of profit from the agrarian community but obstructing it from deeper social penetration".[55]

The inherent contradiction between the interests of capital and the peasant community showed itself up in an upsurge of litigation.

The state was forced to abandon its *laissez faire* attitude and intervene more and more in an attempt to resolve the various conflicts. Those processes of justice in the countryside which has been under the control of influential land-owners were now integrated into the state structure. The revenue law expanded its reach to resolve conflicts between tenants and owners, and the state puts its monopoly of legitimate force at the service of landlords against landless labour. Land was now a tax haven, and with the state directing more resources into it, a class of wealthy landlords with political power endorsed by the state were able to take advantage of these benefits. Washbrook notes that in the period between the wars, "there was little contrast or contradiction between the notion of property right found in official panchayati tribunals and that in the higher courts of law. The two were symmetrical and continuous, reflecting the symbiosis being achieved between the ideology of 'governance' and that of the village landowning class interest".[56]

Nationalist pressures as well as economic factors during the inter-war period led the state to adopt policies favourable to domestic industry through tariff protection, state contracts, regulation of commodity markets and repression of labour. This changed the "parallelogram of class forces", with one side continuing to be the landed interests, and the other shifting from mercantile capital interests to indigenous industry. The class context which India inherited at Independence took shape now. The dilemma for industry lay in the inability of agriculture to respond to rising demand for food and raw materials. According to Washbrook, the "antagonism between the agrarian and industrial orders was exceptionally deep and bitter in the Indian context".[57] The terms of trade between agriculture and industry became crucial in political confrontations. The attempt to cope with this fundamental problem led to the genesis of the "control-permit-quota" raj of the Indian Republic. The alliance between these contradictory class forces was based on the industrial towns providing an opportunity of earnings for labour from the villages, with the dominant landlords maintaining stability in the countryside in the face of increasing pressures from the rural poor through various forms of repression. Both the dominant classes now came to have greater influence over the apparatus of the state on which they were both dependent. Their stake in the state made it inevitable that neither should push their contradictions to the point of risking its collapse. Significantly enough, the "Congress came to consist of a mixture of precisely the same class interests as those pursued by the British in the cause of loyalism. The agrarian/industrialists alliance was fully reflected in its own membership and policies".[58]

Law and Litigation in independent India[59]

The drafting of the Indian Constitution by a Constituent Assembly representing the dominant classes not surprisingly resulted in the retention of the form and institutions of the colonial state.[60] The debates over the right to property never really put property at risk; they reflect more a concern with the technicalities of state capitalism, the need for which was well recognised by the bourgeoisie. The significant increase in the powers of the judiciary in the Constitution display the motives for the first recognition of such powers in the history of the United States: a conservative justification for a mechanism to keep a check and block the redistributive and egalitarian tendencies imagined to be inherent in popular elected legislatures.[61] In the course of the deradicalisation of populist measures of land reform and control of monopolies, the judiciary has lived up to these expectations. Democratic politics, although it continues to be dominated by the substantial landowning class, has brought in pressures for increasingly symbolic uses of populism and rhetoric. As part of the state apparatus, the Supreme Court, too, shares some of the rhetoric and, in the post-Emergency period, more of that populism.

It is in the context of the mediatory role of the state that its vast paraphernalia of legislation must be understood. The Industries Development and Regulation Act of 1951, and the Essential Commodities Act of 1955, grant the state powers to work out the terms of compromise between conflicting interests. The Industrial Disputes Act of 1947 enables the state to step in to resolve labour disputes through arbitration procedures designed to save industry the cost of labour militancy and strikes. The logic of India's class contradictions, with both agriculture and industry caught in the dilemma of limited opportunities for growth results in attempts to cheapen the cost of labour through repression and inflation eroding real wages. The massive upsurge of litigation, much of it directed against the state, can only be understood against the background of this class context.

A theory of litigation in India placing these considerations in the forefront remains to be developed. This paper cannot attempt to do that beyond indicating that much of the litigation can be grouped into two categories:[62] First, litigation as a method of mediating the conflicts of co-dominant classes, and second, litigation as a method of legitimizing and reinforcing the subordination of the dominated classes. Litigation over the acquisition of land by the state for the use of companies is illustrative of the former category, while the great bulk of land law litigation and industrial disputes would come under the latter. The theory must take account of the very significant category of non-litigants who fail to appear as parties because the law denies them *locus standi*. An example of this category would be landless labourers lacking resources for protracted disputes. It is still the law in Republic India that only "persons interested" are eligible for compensation for acquisition of land, and labourers in the words of the Privy Council are "not more interested in the land than a ploughman or a digger is interested in the land on which he works for wages. Nor are their earnings the earnings of the Zamindar, who is interested".[63] Consistently with the rise in power of the "protected tenant" and the eclipse of the zamindar, tenants are now included in the category of "persons interested".

The approach suggested here also helps place the perspective constitutional changes to the right to property which have almost monopolised the attention of scholars. Going beyond the rhetoric in Parliament and the court-room to the inner recesses of power can help provide a more balanced assessment of the implications of the recent deletion of the right to property from the Constitution.[64] It must not be forgotten that it is the Land Acquisition Act of 1894 which sets the standards for compensation, and as long as those standards remain unaltered, the Supreme Court has demonstrated that it would regard any alternative criteria of compensation as discriminatory and unconstitutional if they result in any reduction of the amount payable.[65] The Public Accounts Committee of Parliament, in its Sixty-Second Report, found that in over ninety per cent of compensation cases the awards initially made were appealed against resulting in enhancement of compensation to the extent of one hundred and sixty per cent.[66] The position in the lower courts in 1978 was described by Justice A. P. Sen in the terms: "There has never been a public undertaking in this country . . . but that the landholder has generally secured anything from four to forty times as much for the land as its agricultural price. . . . This result unfortunately springs from a general tendency of District Judges in hearing a reference under S. 18 of the Land Acquisition Act, 1894, to assume the purely agricultural lands, merely by their proximity to a city or town, become endowed with 'special adaptability' as a building site . . ."[67] Even scholars who focus exclusively on the Supreme Court must note that this remark was made in a *dissenting* opinion.

The discriminatory standards in applying the law become apparent when compensation for the land of tribals is considered. Vast areas of their land has been acquired by the state for industrial development. But in their case, "because of laws prohibiting the sale of tribal land to non-tribals the market price of tribal land on which government assessed compensation is paid is usually far less than that of non-tribal land. Compensation is hardly ever paid on the basis of future use . . . to which their land is to be put. The appreciating in the value of the land because of its new use accrues to non-tribal intermediaries of government and para-statal organisations".[68] This is the 'rule of law' in action, restraining the power of officials and at the same time preventing the benevolent exercise of that power.

Under these circumstances, it is easy to see why the substantially rich land-owning class would constitute an effective constituency of support for the legal system in its present form. Similar considerations apply to trade and business interests. Stanley Kochanek in a study of business and politics in India noted that "when the government seeks to make concessions to the private sector to meet the larger needs of economic growth, it is immediately faced by a barrage of criticism from an ever alert left-wing opposition which sees any such concession as a sell-out or as a corrupt, underhanded deal with vested interests".[69] But given the patterns of dominance, it is reasonable to expect that both business and government would have every incentive to accommodate each other at a lower level of visibility. The judicial arena is an obvious choice.

Legal institutions have an elasticity which enables litigants to renegotiate the functions of law without resort to the publicity of a legislative process. This presents big business interests an opportunity to achieve desirable results through litigation, an avenue not obstructed by the imperatives of popular democratic politics. Access to the legal system thus permits legislatures to derive the electoral and symbolic gains of "progressive" legislation, while business interests make instrumental gains through the legal process. It is not surprising, therefore, that a study by an officer in the Monopolies and Restrictive Trade Practices Commission presents a dismal account of failure and legal lacunae in the provisions of the M.R.T.P. Act of 1969. He concludes, "the efforts of the government to investigate into the monopolistic trade practices have been rather ineffective, and whatever enquiries were instituted have not preceeded further due to writ petitions filed by the parties concerned. The parties continue to indulge in the alleged monopolistic trade practices".[70]

If the effects of particular judicial decisions are kept analytically distinct from the effect of the structural features of the legal system as a whole, it is easy to see why despite occasional set-backs, business interests would support the legal system. The multiplicity of courts, and the lack of sufficient institutional cohesiveness among individualistic judges on even Supreme Court Benches, so well demonstrated by Dhavan, present opportunities for reversals of particular adverse decisions, while yielding the advantages of delaying hostile state action. An example is provided by the Supreme Court's decision in November 1979, which overruled an earlier judgment of Justice Krishna Iyer, and held that profits made by "charities", such as the Chambers of Commerce, were not taxable.[71]

The relevant legal provision, which had repeatedly been litigated, had been amended by Parliament to bring such profits within the tax net. The dissenting judge, endorsing Justice Krishna Iyer, noted that the majority decision frustrated the amendment. Such outcomes are fairly frequent.

It is thus the nature of the state and the class configuration which accounts for the continued survival of, and the support base for, the legal system, rather than some special predilection among Indians receptive to western law, or the latent adaptability of their tradition or culture. As both Galanter and Derrett have noted, even the Emergency state did not envisage a radical transformation of the legal system.[72] This is not very surprising because when the economic policies of the period are examined, it is found that "the balance of advantage as between the agricultural and industrial bourgeoisies" did not shift to any marked degree.[73] The former was favoured with reduction in fertiliser prices, high support prices during a bumper harvest, tardy land reform and half-hearted abolition of 'bonded labour', renewed emphasis on technical improvements beneficial to a narrow segment of the rural population, and the stubborn refusal to make agricultural taxation a concurrent subject. The latter came in for tax concessions, liberalised import and capacity licensing regulations and assurances of government contracts through increased state expenditure.

As long as class configuration and the nature of the state remain unchanged, the legal system can be expected to command support from powerful constituencies.

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[*] I am extremely grateful for patient encouragment, useful suggestions and critical comments of Drs. Rajeev Dhavan and John Toye. I am indebted to Prof. Yash Ghai for making available to me the article by Dr. Washbrook cited in this paper. Despite such assistance, its inadequacies, such as they are. are mine own.

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18

TAKING SUFFERING SERIOUSLY: SOCIAL ACTION LITIGATION IN THE SUPREME COURT OF INDIA

UPENDRA BAXI

Introduction

The Supreme Court of India is at long last becoming, after thirty-two years of the Republic, the Supreme Court for Indians. For too long, the apex constitutional court had become "an arena of legal quibbling for men with long purses".[1] Now, increasingly, the court is being identified by Justices as well as people as the "last resort for the oppressed and the bewildered".[2] The transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary.[3] A post-emergency phenomenon, the transformation is characterized chiefly by judicial populism.[4] The court is augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimation crisis.[5] In the process, like all political institutions, the court promises more than it could deliver and is severely exposed to the dynamics of disenchantment.

For the present, and the near future, however, there is little prospect of the court reverting to its traditional adjudicatory posture where people's causes *appear* merely as issues, argued arcanely by lawyers and decided in the mystery and mystique of the inherited common-law-like judicial process. People now know that the court has constitutional power of intervention, which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviance. Undertrial as well as convicted prisoners, women in protective custody, children in juvenile institutions, bonded and migrant labourers, unorganized labourers, untouchables and scheduled tribes, landless agricultural labourers who fall prey to faulty mechanization, women who are bought and sold, slum-dwellers and pavement-dwellers, kins of victims of extra judicial executions — these and many more groups now flock to the Supreme Court seeking justice.

They come with unusual problems, never before so directly confronted by the Supreme Court. They seek extra-ordinary remedies, transcending the received notions of separation of powers and the inherited distinctions between adjudication and legislation on the one hand and administration and adjudication on the other. They bring, too, a new kind of lawyering and a novel kind of judging. They add a poignant twist to the docket explosion[6] which was so far merely a routine product of the bar committed only to justice according to the fees. They also bring a new kind of dialogue on the judicial role in a traumatically changeful society.[7]

The medium through which all this has happened, and is happening, is social action litigation, a distinctive by product of the catharsis of the 1975-77 emergency. What emerged as an expiratory syndrome is now a catalytic component of a movement for "juridical democracy"[8] through innovative uses of judicial power.

Throughout this paper, I use the term "social action litigation" (SAL) in preference to the more vougish term 'public interest litigation' (PIL). The label PIL has slipped into Indian juridical diction as effortlessly as all Anglo-American conceptual borrowings readily do. But while labels can be borrowed, history can't be. The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history.

The PIL effloresence in the United States owed much to substantial resource investment from the government and private foundations; the PIL work was espoused by specialized public interest law firms.[9] The issues within the sway of PIL in the United States concerned not so much state repression or governmental lawlessness but rather civic participation in governmental decision-making.[10] Nor did the PIL groups there focus preeminently on the rural poor.[11] And, typically, PIL sought to represent "interests without groups" such as consumerism or environment.[12] Given the nature of state and federal politics, PIL marched with public advocacy outside courts through well established mechanisms like lobbying.[13] In brief, the PIL movement in the United States involved innovative uses of the law, lawyers and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society.[14]

No doubt, Indian social action groups should know the essence of the American PIL experience and particularly the structural reasons for its failures and successes. PIL activism has instead of generating pressures for structural changes in law and society ended up servicing the much exposed ideology of interest group pluralism and legal liberalism; indeed, public advocacy programmes have tended to "enhance the legitimacy of processes that may not really change".[15] Similarly, PIL activism is, despite the affluent society, unable to overcome problems of resources, both in terms of person-power and finances.[16] Critiques of PIL activism raise doubts concerning its overall impact as regards both the modes of decision-making and the short and long term results achieved.[17]

No doubt, there have been fruitful innovations in legal doctrine and technique (*e.g.* liberalization of *locus standi,* growth of techniques of judicial review over administrative action and regulatory agencies and occasional institutionalization of PIL advocacy). No doubt, too, there are certain items on the *programschrift* of reform of administration, adjudication and legislation of concern and interest to social activists in India.[18] But, at the end of the day, the realization seems to be dawning that while all these technical developments ultimately raise "basic issues of power and equality in society," these sorts of developments "have to do with 'justice' in the most impoverished sense of the word" and are "truly marginal".[19]

The Indian social action groups should ponder the emerging perceptions of failure of PIL activism in the United States. If these are valid, the challenge before the American socio-legal community is to rethink the basic assumptions behind public advocacy and this process is now well under way.[20] In India, perhaps, we can learn from the American PIL failures. But so great is the hold of colonial legal imagination that, in the last analysis, these lessons will be learnt only after the attempts at transferring the success stories (in terms of techniques, doctrines and models of organization of SAL) have demonstrably failed. In the process, the appreciation of the vital political cultural differences between the two societies will be deferred and a looseminded importation of notions apposite to the circumstances of development in the United States will continue to obscure a genuine appreciation of the distinctive social and historical forces shaping, generally, the role of adjudication in India. I propose to use the notion SAL, rather than PIL, to avoid these pitfalls.

SAL : Some contributory influences

Judicial populism

A striking feature of SAL is that it is primarily judge-led and even judge-induced. And it is in turn related to juristic and judicial activism on the High Bench.[21] Many Justices have, on and off the bench, advocated active assertion of judicial power to ameliorate the miseries of masses. Although the active, almost explosive, assertion of judicial power in the aid of the dispossessed and the deprived began in the aftermath of the emergency, judicial populism had become pronounced even before the emergency, particularly in the great decisions in *Golak Nath*[22] and *Kesavananda Bharati.*[23] In these decisions, familiar to every student of constitutional politics of India, Justices who wished Parliament to have unbridled power to amend the Constitution invariably sought to justify it in the name, and for the sake, of the 'teeming millions' of impoverished Indians.[24] They sought to mould constitutional interpretation and doctrine in unmistakably and emotionally surcharged people-oriented ways. Populist rhetoric is writ large in many judicial opinions, on both sides, in these landmark decisions. The following excerpts, one from Justice Dwivedi and the other from Justice (now Chief Justice) Chandrachud in *Kesavananda* suffice to offer us a glimpse of the emergent judicial populism in the early seventies:

> The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.[25]

And further:

> The Court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority protection to the humanitarian concept of the protection of the weaker section of the people.[26] It is really the poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights. In the absence of an explicit mandate, the Court should abstain from striking down a constitutional amendment which makes an endeavour 'to wipe out every tear from every eye'.[27]

In much the same vein Justice Chandrachud was moved to say (with reference to constitutional precedents):

> But these landmarks in the development of the law cannot be permitted to be transformed into weapons for defeating the hopes and aspirations of our teeming millions, —half-clad, half-starved, half-educated. These hopes and aspirations representing the will of the people can only become articulate through the voice of their elected representatives. If they fail the people, the nation must face death and destruction. Then, neither the Court nor the Constitution will save the country.[28]

The elevation of Justice Krishna Iyer to the High Bench in 1974 reinforced the tendency towards judicial populism. He unremittingly insisted that the law is meant for the people and not the people for the law, and as a neo-Marxist, he meant by 'people' mostly the proletariat and not the propertariat.[29] He used every conceivable occasion, on and off the bench, to further the cause of the 'toiling masses' and the 'weaker sections of the society'.[30] He also indefatigably demonstrated and critiqued the colonial and alienating nature of legal processes and institutions and crusaded for a radical reorientation of the bench and bar towards the urgent tasks of development and justice for the Indian masses.[31] Justice Krishna Iyer enhanced the sensitivity of judges and lawyers to exploitation and suffering in a way no other Justice of the Supreme Court had ever done.

Emergency populism

During the 1975-77 emergency, legal aid to the people was one of the key points of the 20 Point Programme launched by Indira Gandhi, to which Justices Krishna Iyer and Bhagwati, themselves deeply committed to the spread of legal aid movement,[32] readily responded. They led a nation-wide movement for the promotion of legal services. They organised legal aid camps in distant villages; they mobilized many a High Court Justices to do *padayatras* (long marches) through villages to solve people's grievances. They, through 'camps' and *lokadalats* (people's courts) sought to provide deprofessionalized justice. They also in their extra-curial utterances, called for a total restructuring of the legal system, and in particular of the administration of justice.[33] In a sense, their movement constituted a juridical counterpart of the 1971 *Garibi Hatao* (eliminate poverty) campaign, as well as of the 20 Point Programme. Although they stopped short of overtly legitimating the emergency regime, they remain vulnerable to the charge of acting as legitimators of the regime. Be that as it may, many Supreme Court and High Court Justices did systematically become people-prone in a manner conducive to the growth of judicial populism.

In the immediate aftermath of the emergency, populist rhetoric and stances decided many a vital issue of constitutional polity.[34] Judicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.[35] Partly, too the court was responding, like all other dominant agencies of governance, to the post-emergency euphoria at the return of liberal democracy.

The SAGs-press nexus

One such institution was the press, which for the first time since independence strove consistently to expose governmental lawlessness and social tyranny through investigative journalism of a high order. Like judges, editors and correspondents realized that some of the 'excesses' of the emergency were not different in kind, but only in degree, from the everyday excesses of state power on the hapless citizens.[36] The press too felt the need for public atonement; simultaneously, many journalists realized that they owed their freedom of the press ultimately to the people.[37] People's problems began to matter.[38] The press, for example, highlighted atrocities on untouchable and adivasis, the sub-human plight of prisoners, the cruel extra-judicial executions through the so-called "encounters" involving use of the police as counter insurgency force, the excesses of protective custody of women and children and numerous related instances of violation of fundamental human rights of the people.

This print media transformation enabled activist social action groups (SAGs) to elevate what were regarded as petty instances of injustice and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power. SAGs found thus a new ally in their struggle for social development and change. The SAGs-press nexus provided one a fertile setting (as we shall note later) for the birth and growth of the SAL.

At the same time, the press became a medium of evaluation of how the dominant institutions of the government "collaborated" against the people.[39] The role of judges and courts was integral to this agonized reappraisal. And the court, and some Justices, became exposed to merciless professional critiques of the court's emergency performance.[40] In this environment, an open letter to the Chief Justice of India written by four anguished law teachers, chastizing the court for its reversal of conviction of two police persons for raping a tribal girl in the police station led to a nationwide mobilization of women's organizations and groups. Unexpectedly, it culminated in an unprecedented march by women's organizations to the Supreme

Court of India demanding a review of the decision, which it ultimately declined.[41]

All this enhanced the visibility of the court and generated new types of claims for accountability for wielding of judicial power. And this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques of juristic activism.[42] The court began to expand the frontiers of fundamental rights and of natural justice. In the process, they rewrote many parts of the Constitution. The right to life and personal liberty under procedure established by law in Article 21 was now converted *de facto* and *de jure* into a due process clause contrary to the intendment of the makers of the Constitution.[43] This expanding right was soon to encompass within itself the right to bail, the right to speedy trial, the right to dignified treatment in custodial institutions, the right to privacy and the right to legal services to the poor.[44] Prisons and places of detention, theaters of torture and terror, received high priority attention, especially at the hands of Justice Krishna Iyer who developed, on the whole, a new normative regime of rights and status of prisoners and detenues.[45] The insistence that the states behave in good faith and with utmost reasonableness in dealing with citizens and persons grew apace. Principles of administrative law met with urgent, painstaking and thorough revisions.[46] The doctrinal invovations in their exuberance and normative impact provided further impetus to SAL.

Dramatis personae of SAL

Some Justices of the Supreme Court were thus the prime actors in SAL. Regardless of the argumentative strategies at the bar, and often regardless of the immediate frameworks of the writ proceeding, they blazed new trails in constitutional interpretation.[47] By 1979 it was clear to the discerning members of the bar and to social activists that the court was indeed in search of a new kind of constitutional litigation.

And the first dramatic opportunity was provided by a Supreme Court advocate, Ms. Kapila Hingorani, who filed a writ based on a series of articles in a national daily, *The Indian Express,* exposing the plight of Bihar undertrial prisoners, most of whom had served long pre-trial detention, indeed to a point that they had as it were, sentences to their credit.[48] In 1980, two professors of law made a letter to the editor of *The Indian Express* describing the barbaric conditions of detention in the Agra Protective Home for Women the basis for a writ petition under Article 21.[49] This was followed by a similar petition for Delhi Women's Home by a third year law student in Delhi Law Faculty and a social worker.[50] A law teacher on a social science research fellowship successfully brought to completion the trial of four young tribals, who grew up in a sub-jail awaiting trial.[51] Three journalists after an expose of a thriving market in which women were bought and sold as chattels, filed a writ demanding prohibition of this practice and immediate relief for their victims through programmes of compensation and rehabilitation.[52] In the same year, a legal correspondent of *The Statesman* brought to the notice of the court the inhumane conditions of detention of 'Naxalite' prisoners in the Madras jail, challenging in the process the entire edifice of the Prisons Act, 1892.[53] The special legal correspondent of *The Hindustan Times* also brought to the court a social activist's report on forced importation of seventy-five young children for homosexual relations in Kanpur jail.[54] In early 1982, social workers of the Gandhi Peace Foundation, assisted by the author, filed writ proceedings against the state of Madhya Pradesh for allowing bonded labour to be paid wages of disability: that is, wages in kind of kesari dal, a toxic substance causing incurable lathyrism among the bonded labourers.[55] A newly formed association of law teachers has brought writ proceedings against the same state for inhuman torture of young prisoners in Chattarpur jail.[56]

This random listing illustrates the new brand of socio-legal entrepreneurs, who approach the court *pro bono publico* on their own, without much support from the bar (and often at its chagrin) and with their social commitment as their only asset. In addition, there are a handful of lawyers and lawyer-led SAGs who have also contributed to SAL.[57] Among the lawyer-led SAGs are three principal groups: the Citizens for Democracy (CFD),[58] the People's Union of Civil Liberties[59] and the People's Union for Democratic Rights.[60]

Of about 75 SAL writs filed between 1980-82, a preponderant number have been filed by social activists rather than individual lawyers or lawyer groups.[61] And this has been made possible by a rather unique development. Much of SAL in this period has arisen out of letters written by individuals to Justice P. N. Bhagwati in his twin capacities as the Justice of the Supreme Court and the Chairperson of the National Committee for the Implementation of the Legal Aid Schemes. The letters usually rely on newspapers and periodicals investigative reportage. More often than not, the Justice brings them on the board of the court, converting these letters into writ petitions. Justice Bhagwati has gone so far as to invite members of the public and especially public spirited citizens to bring to his notice violations of basic human rights, as embodied in the Constitution, for suitable judicial action.

In *habeas corpus* petitions, the court usually acts on letters written by or on behalf of the detenue. But Justice Bhagwati has generalized this technique so radically that it could be justly said that he made a momentous social invention — namely, the epistolary jurisdiction. After experimenting with it for some time, he was able, too, to fully legitimate the epistolary jurisdiction by imaginatively extending the law of *locus standi* in constitutional litigation in the High Court Judge's case.[62] The judge-led and judge-induced nature of SAL renders it strikingly distinctive.

The social substance of SAL

Not thus merely in the style and process of generation of the SAL is the contemporary Indian experience unique. The substance of the SAL in India is also distinctive to its contemporary condition. In essence, much of SAL focuses on expose of repression by the agencies of the state, notably the police, prison and other custodial authorities. Close to this category are the cases which seek to ensure that authorities of the state fulfil the obligations of law under which they exist and function. In other words, much of SAL is concerned with combating repression and governmental lawlessness. Only, so far, in rare instances does the SAL concern assertion of new constitutional rights.[63] The other distinctive feature of SAL proceedings is that all of them are article 32 petitions; that is, they are writ proceedings for the enforcement of the fundamental rights. The Supreme Court is empowered, and some would say rather obligated, to duly consider them.[64]

Both these features lend a special complexity to the SAL in India. On the one hand, they impart high visibility and exalted status to the cause; on the other hand, they present some specific problems for the court, since all the complaints of governmental repression and lawlessness raise disputed questions of fact which the court does not as a matter of practice normally handle and which cannot be wholly satisfactorily dealt with by affidavit evidence. We revert to these problems later. For the moment, it would suffice to emphasize this distinct profile of the SAL in India. SAL thus compels judges and lawyers increasingly to take human suffering seriously.[65]

Old structure, new concerns

The court's handling of SAL is at the present in an experimental phase. Much of the future of the SAL ultimately depends on the organizational learning capacity of the court in dealing with novel and complex problems and this capacity is affected by existent judicial thought — ways and styles of decision-making.

The most crucial general factor affecting, for weal or woe, the career of SAL is the fluctuating bench-structure. The bench which admits the writ petition is not necessarily the same, unless there is a constitution bench of five Justices, as the one hearing it. Even if the presiding judge remains common, his companion Justices may differ, often from one hearing to the next. The presiding judge, as well as the SAL petitioner (whether in person or through counsel) thus have to bear additional burdens of persuasion, more so because not all Justices are as yet equally attracted by or committed to the SAL.[66] The difficulties are reinforced when the presiding judge is unsympathetic to SAL; or even if moderately sympathetic, he is daunted by the problems of evidence and of shaping new types of reliefs.

Epistolary jurisdiction as developed by Justice Bhagwati was partly addressed to this problem. Once a letter received by him was treated by him as a writ petition, he ensured that it came on his board. His court No. 2 has, through this process, the largest number of SAL matters. While this result is welcome to many a SAL petitioner, it carries its own costs. First, it indirectly deprives the Chief Justice of India of his undoubtedly important role in docket management and allocation of work to his companion Justices. This has clearly its own implications on *inter se* relationship among Justices, including perhaps the growth of factionalism on the court.[67] Second, many Justices are deprived by this result of epistolary jurisdiction of the much needed exposure to SAL; in the process, the learning capacity of the court as an institution is constricted. Third, the existing overload on court no. 2 is accentuated, causing problems of priority in handling. If high priority is accorded to SAL at the cost of other matters, irate leaders of the bar (as is happening) are bound to seek to discredit SAL.[68] If such priority is not accorded, SAL matters continue to drag on like others. And this (as is already happening) begins to raise serious questions concerning the impact of judicial intervention for such causes.[69]

On the other hand, most SAL matters do require in their early phases, careful judicial handling. SAL is distinctive in that it does not raise the problems of validity of a law on the ground that it violates fundamental rights. The heart of the SAL proceedings is rather that gross violation of fundamental rights has actually occurred in the exercise of state powers, either by commission (repression) or omission (lawless disregard of statutorily or constitutionally imposed duties). The facts relied upon initially by the SAL petitioner, in most cases, are as stated in the press. And the SAL petitioner is himself often not the victim of repression or lawlessness but a public citizen.

Invariably, therefore, the court has to satisfy itself about the factual foundations of the proceedings and this requires constancy of the bench. Justice Bhagwati's initiative in retaining many SAL matters with him seems to proceed on the appreciation of this requirement. On the other hand, it imprints the SAL with the insignia of an individual Justice, whereas what is needed in days to come is a collective imprimatur of the court for the new litigation. The future of SAL depends, in great measure, on a satisfactory resolution of this dilemma.

Like the technique of epistolary jurisdiction for its initiation, SAL also requires 'creeping' jurisdiction for its progress. Not a single leading SAL matter has yet resulted in a final verdict; the fundamental issue of how the court should make the state and its agencies fully liable for deprivations or denials of fundamental rights still remains to be authoritatively answered. It is the task of the SAL entrepreneurs to ensure that these issues are ultimately reached with desired results. But, in the meantime, the court rules through interim directions and orders. Bit by bit, it seeks improvement in the administration, making it more responsible than before to the constitutional ethic and law.

This kind of creeping jurisdiction typically consists in taking over the direction of administration in a particular arena from the executive. The blinded undertrials receive medical examination at New Delhi and the expenses of their stay and their relatives are borne by the state under interim orders of the court; conditions in Agra and Delhi Protective Homes for Women begin to steadily improve, again through a series of interim administrative orders. Fresh directions are issued by the court to the state of Bihar from time to time to ensure that undertrials at least serve less time in pretrial detention and not in any event more than the time which they would have served had they been tried and convicted. These and many examples show that the court is undertaking those very administrative decisions, which the state should have taken in the first place.[70] In the meantime, the ultimate constitutional issues patiently await their turn.

Doing something about these questions is comparatively far more difficult than compelling the state to do this or that under the creeping jurisdiction. It is difficult because it involves viable momentous normative innovations in the lawyer's law.[71] Some of these have already been attained: for example, expansion of *locus standi*,[72] whittling down of the range of documents for which government may claim privilege,[73] devising of newer way of fact finding in the SAL type proceeding[74] and devising of prospective inhibitions for potential recurrence of rights-violations in the same arena.[75] All this is noteworthy only so long as the underlying constitutional issues of citizens' rights against the state for violation of fundamental rights are faced and resolved.

These issues in the final analysis relate to exposing the state to liability for wideranging of compensatory arrangements for violations of fundamental rights of the people. The court has, already, rightly rejected the facetious argument of the Attorney General of India in the Bihar blindings case that when police torture prisoners they do so outside the authority of the law and, therefore, the state may not even at threshold be considered liable for the manifest unlawful actions of its agents.[76] Well begun is indeed half done.

And yet the challenge of devising appropriate compensatory arrangements for such violations is very daunting. How do we compensate young persons manacled for long years in pre-trial detention for their enforced loss of childhood and all deprivation of sociability? How do we compensate the blinded undertrials? Or the ones who have been inhumanely tortured? What does a court do, under fundamental rights jurisdiction, when it finds young persons thrown to jail for no other reason than facilitating homosexual assaults? Or when it finds that inmates of protective home for women are first allowed to go insane and in the wake of the court's inquisition are put out on roads?[77] Or where the woman who was bought and sold vanishes from Delhi even before the hearing of writ petition has to fully commence? What relief may the court provide in situations of extra-judicial executions? Creeping jurisdiction is an opposite strategy for gradualist institutional renovation; it furnishes no answers to the questions raised by the victims of repression and lawlessness, past, present or future. Inability to forge onerous patterns of liability for the state for gross violations of rights may well deprive the SAL of its future.

Evidentiary problems in SAL

Accomplishing such a jurisprudential feat calls not just for the vision and commitment of a high order on the part of Justices; it also requires, careful attention the lowly details of how facts about the violations of rights are proved. Without this, no jurisprudence of liability of the state for constitutional violations can survive for long. We accept the principle of compensation for rights-violation the state will say then, but it will immediately add: "prove it" !

The problems of proof are the most severe in cases of state repression and there seems emergent a common pattern of argumentation by state counsel which make these problems more acute. First, state counsel deny on affidavit any or all allegations of torture or terror. Second, they contest if not any more the standing, the *bona fides* or the degree of reliable information of the social activists who come to the court. Often wildest ulterior motives are attributed to them.[78] Third, they decry the sources on which the SAL petitioners rely: mostly media and social science investigative reportage. Fourth, they raise all kinds of claims under the law of evidence and procedure to prevent the disclosure of documents relevant to the determination of violation of fundamental rights. Fifth, even when disclosed there is always the possibility of impugning their evidentiary value. This is made possible by the device of multiple investigations; the state sets up many panels, one after another and often consents, in addition to the investigation by the Central Bureau of Investigation.[79] When despite all this, the state is likely to lose the proceedings in favour of the SAL petitioners, it proceeds to give concessions and undertakings, thereby avoiding a decision on merits.[80]

And the court, too, interested more in the inhibition of the future illegalities is ready to develop a jurisprudence of the SAL *ex-concessionis*. The court, rightly refuses to view the SAL proceedings as adversarial in nature; it likes to foster such collaboration between the SAL litigant and the state as would result in sound institutional arrangements avoiding recurrent injustice and thus avoiding in long term SAL type confrontation between the public-spirited citizen and the state. This technique offers a neat way out of the burdens of proof on questions of fact; therein probably lies its appeal to the judges.

At the same time, the court is experimenting with several different strategies to overcome the problem of disputed facts, without having to take evidence itself. First, Justice Bhagwati has initiated the idea of socio-legal commissions of enquiry. The court asks social activists, teachers and researchers to visit particular locations for fact finding and to submit a quick, but complete, report, which may also contain suggestions and proposals. So far the device of commissions has been invoked at least thrice.[81] The commissions are, under the court's orders, to be financed by the state. Second, the court has in a number of cases of torture or ill-treatment called upon medical specialists to submit[82] comprehensive reports and suitable therapy at state cost. Third, the court has used on one or two occasions the services of its own officials[83] or those of the High Court.[84] In some cases, it has asked the district judge not merely to ascertain facts[85] but also to monitor the implementation of the various directions given by the court.[86]

These modes of fact finding are somewhat novel and will raise, as the many SAL matters proceed to completion, rather difficult issues of evidence and procedure. But the court is experimenting with new methods to go beyond the notoriously eclectic affidavit evidence.

SAL as an aspect of judicial statepersonship

The growth of SAL on the Supreme Court bears out amply what I felt concerning the newly emerging role of the Supreme Court in the dying hours of 1979. I said then:

> The politics of the Court — be it the 'purest politics' of constitutional adjudication or the hurly burly politics of power-

be held fully accountable under the Constitution. The executive may refuse to bring into force laws duly enacted by Parliament; but the district bureaucrat must be brought to book for commission and omission. Leave to politicians their opium-dreams of omnipotence of their power and influence; but bit by bit prevent them from single-minded excesses of power. The respondents in the SAL matters are always political small fries: so the big ones may not complain. But the results of the SAL irritate the Big Men. No matter how irate (as was Jagannath Mishra, the Chief Minister of Bihar, on the Supreme Court's swift probe in the Bihar blindings), they cannot so easily manipulate public opinion in their favour as the court. And the print media opinionators just love the court (barring the trauma of the judges case) because the court is now newsworthy, to the say the very least. As regards repression and lawlessness, the Supreme Court since 1980 has become the third chamber of Parliament and is close to acquiring, more effectively, the attributes of the House of the People. The SAL fits in beautifully with the well-conducted orchestration of concord and discord with the executive.

All the court has now SAGs with it: and also ORPs (organisations of the rural poor) and PORPs (participatory organisations of the rural poor).[101] The SAL gives to the court the socio-political space it needs, on the eve of the closure of the post-emergency era. And it adds to the space already available to the SAGs, ORPs and PORPs.

The SAL movement may be viewed as relatively minor exercises in class-transcendence, subject to all the frailties of such struggles. Backslidings are bound to occur. But it is doubtful that the evolution of the court as a people-oriented institution can be arrested substantially. Of course, nothing is irreversible at least in legal history. But it would require considerable mobilization of regressive forces to return the court to its club-house cloisterings.

In fact, the SAL movement is well under way to institutionalization. Hopeful signs for the growth of the SAL type professional competence abound.[102] The national legal aid movement is rapidly acquiring SAL orientation.[103] And more and more High Court Justices are becoming SAL-prone.

The surest sign of modicum of success of the SAL movement is provided by the changing attitude of the Supreme Court bar towards it. In 1979, when the court expressed a hope that the bar association intervene in Bihar undertrial cases, there was just no stirring of response.[104] When two law professors filed the Agra Women's Home petition, there was a certain amount of amused interest on the part of the senior leaders of the bar. When the SAL dockets explosion began, there was anguished protest. A leading state counsel expressed his exasperation in the open court at the day long proceedings of SAL based on the media investigative reportage; his trenchantly expressed protest was met by Justice Bhagwati with a sharp admonition: "Hold your tongue". In the course of the Agra proceedings, senior lawyers were openly heard to say that if the Supreme Court thus wants to do social justice, it had better met on the weekends ![105]

The bar's reaction has moved from indifference to indignation at what it regards as freak litigation. At the present moment, two utterly different types of responses seem to be emerging. One is a frankly antagonistic and hostile response. A senior advocate, and a member of Rajya Sabha, moved two motions pertaining to the 'public interest' litigation in the Supreme Court. The first at the end of 1981 urged the government to prescribe certain guidelines for this kind of litigation; this suggestion was promptly discounted by the then Law Minister, Shiv Shankar. In late April, 1982, the same member made highly derogatory references to SAL. He saw in it nothing less than a foreign conspiracy to destabilize the Indian government through the activation of the Supreme Court.[106]

On the other hand, some senior lawyers have now begun to say that they have always been pursuing SAL. They cite a number of examples where public interest was involved: the National Security Ordinance and Act, the Bearer Bonds Act, and other such matters.[107] Even H. M. Seervai could not resist the temptation, despite his contemptuous attitudes towards Justices Krishna Iyer[108] and Bhagwati[109] to assert that the Bombay bar's initiative in challenging non-appointment of additional High Court Justices and their transfers was a shining example of the bar's deep commitment to the new litigation.

Undoubtedly, an empirical study of the changeful and conflicting attitudes of the bar to the new litigation is necessary. But available materials suggest a degree of agonizing within the bar and as low emergence of a new concern. The SAL movement does pose alternate modes of lawyering the Indian people.

The response of the administration to SAL has also been mixed. The top bureaucrats seem to resent the mini take-over of administration through creeping jurisdiction. Their resentment is shown in indifferent compliance of the court's interim directions in many proceedings. But in some cases over a period of time, the tenacity of SAL petitioners and of the bench has overborne their resistence.[110]

Conclusion

This impressionistic account of the SAL movement in last two years does indicate that small *ad hoc* beginnings have been made. These have received such nation wide attention as to generate emulation as well as hostility. Many avoidable deficiencies characterize the SAL work.[111] There is considerable introspection among the social activists on the role and limits of the court's intervention. We still lack an assessment of what is really happening although it is perhaps too early to think of exploring the impact of the SAL. And there persists the need for developing critical thought on the mainsprings and meanderings of SAL.

Projections of the future of the SAL can, at the present moment, be only subjective. But to me the future of SAL looks bright. The future of law in India is partly, but vitially, linked to the future of social action litigation because through it great and unending injustices and tyranny begin to hurt the national conscience and prod at least one major institution of governance to take people's miseries seriously.

For those who take people's sufferings seriously, there is no rejoicing; even revolutions provide transient occasions of celebration. The SAL is at best an "establishment revolution"[112] still, it nourishes hope in an otherwise darkening landscape of Indian law and jurisprudence.

REFERENCES

1. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 S.C.C. 225 at 947 (hereafter cited as *Kesavananda*).
2. *State of Rajasthan* v. *Union of India*, (1979) 3 S.C.C. 634 at 670 (per Goswami J.).
3. It is customary to think about administrative and regulatory agencies as 'captive'. See, *e.g.*, D. M. Trubek "Public Policy Advocacy: Administrative Government and Representation of Diffuse Interests" in M. Cappelletti and B. Garth (eds.), III *Access to Justice* (1979) 445 and the literature there cited. But, barring small causes courts and similar other judicial fora, the notion of 'captive agency' has not been explicitly extended to appellate courts. Even these latter can become 'captive' to certain professional interests, backed by societal dominant groups.
4. See U. Baxi, *The Indian Supreme Court and Politics* (1980) 121-248 (hereafter cited as "Baxi, *Politics*").
5. Baxi, *Politics* at 246-48A.
6. See R. Dhavan, *The Supreme Court under Strain: The Challenge of Arrears* (1979); U. Baxi, *The Crisis of the Indian Legal System* (1982) 58-83 (hereafter referred as Baxi, *Crisis*).
7. See U. Baxi, "On How Not to Judge the Judges . . ." (Mimeo: (1980) Paper presented at a Seminar on Judicial Process and Social Change, Indian Law Institute and Andhra University; Justice O. Chinnappa Reddy, "Judicial Process and Social Change" (1981) LXVI *Supreme Court Journal* 1.
8. For an elaboration of the notion of juridical democracy, see T. Lowi, *The End of Liberalism* (1969) 291-303.

9. See L. G. Trubek and D. M. Trubek, "Civic Justice through Civil Justice: New Approach to Public Interest Advocacy in the United States" in M. Cappelletti, (ed.), *Access to Justice and The Welfare State* (1981) 119.
10. *Ibid.*
11. See, generally, J. Handler, *Legal System and Social Change: A Theory of Law Reform* (1979) passim; F. F. Piven and R. A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (1977).
12. See *supra* note 9. Trubek's analysis of 'interests without groups' needs to be extended to the wider setting of the political economy of advanced capitalist societies. See, *e.g.*, C. Offe, "Political Authority and Class Structure: An Analysis of the Late Capitalist Societies" (1972) 2 *International Journal of Society* 73.
13. J. M. Barry, *Lobbying for the People* (1979).
14. See Trubek, *supra* note 9; also see the insightful analysis by Handler, *supra* note 11.
15. Trubek, *supra* note 3 at 494.
16. The PIL movement suffered a grievous setback when the Ford Foundation terminated its grants to the PIL firms in 1979. Until that year the Foundation had provided US $ 21 million to these firms. See for a lively account of the resource-viccisitudes of PIL movement, D. S. Broder, *Changing of the Guard: Power and Leadership in America* (1980) 225.

    The support from the bar is miniscule. In 1977 the Carnegic Endowment awarded $ 250,000 to the Council on Public Interest Law, subject to the condition that the American Bar Association raises a like amount. The award was cancelled because the Association did not raise the corresponding amount. See Trubek and Trubek, *supra* note 9 at 127-28.

    Specialised public advocacy groups, too, have staggering problems of financial viability. It has been estimated that "the direct costs to *one* company participating in a *single* regulatory hearing can often exceed $ 500,000" whereas the "entire budget for the proposed consumer advocacy agency, including all administrative costs, research programmes and the like was $ 500,000"! In the circumstances, PIL activity is unlikely to achieve "genuine resource equalisation." See Trubek, *supra* note 3 at 477-78.

    The resource-problems in themselves highlight the need for a thoroughgoing structural revision of the American legal system; PIL failures may reinforce the need for such changes but cannot provide these.
17. See *supra* notes 3 and 9.
18. *E.g.*, the rights of access to information and sources of information; over-delegation of legislative power; quest for refined mechanisms other than court-systems of ensuring accountability. See Lowi, *supra* note 8; T. E. Ely, *Democracy and Distrust* (1980). For the Indian situation, see Baxi, *Crisis*, *supra* note 6 at 41-57.
19. See *supra* note 9 at 119.
20. See *supra* notes 3, 9 and 11.
21. Baxi, *Politics*, *supra* note 4; Baxi (ed.), K. K. Mathew, *Democracy, Equality and Freedom* (1970).
22. *Golak Nath* v. *State of Punjab*, A.I.R. 1967 S.C. 1643.
23. *Supra* note 1.
24. For examples of Populist stances see U. Baxi, *Politics*, *supra* note 4 at 127-51; Baxi, Some Reflections on the Nature of Constituent Power in R. Dhavan and A. Jacob ed. *Indian Constitution: Trends and Issues*, (1977) 122; R. Dhavan, *The Supreme Court and Parliamentary Sovereignty* (1979).

The debate over the reaches of the amending power has pre-eminently been concerned with the 'right' to property (with the conspicuous exception of *Indira Nehru Gandhi* v. *Raj Narain* (1975) I Supp. S.C.C. 1. The 'right' now stands deleted. But the socialist content of the Preamble and the Directive Principles of State Policy have provided and will continue to do so, fruitful *topoi* for populistic judicial reasoning.

25. *Kesavananda* at 947 (para. 1947).
26. *Id.* at 948-49 (para. 1952).
27. *Id.* at 949 (para. 1953).
28. *Kesavananda* at 968. See also at 991, 1005.
29. Baxi. *Politics*, *supra* note 4 at 170-72, 233-45; Baxi, *Crisis*, *supra* note 6 at 209-43. See also K. M. Sharma, "The Judicial Universe of Mr. Justice Krishna Iyer" (1981) IV S.C.C. *Jour*. 38.
30. *E.g.*, V. R. Krishna Iyer, *Law and the People: A Collection of Essays* (1972); *Id.*. *Law, Freedom and Change* (1975); *Id.*, *Some Half Hidden Aspects of Social Justice* (1980).
31. Baxi, *Politics*, *supra* note 4 at 121-77.
32. See the Krishna Iyer Committee Report, *Processual Justice to the People* (1975) and its critique in Baxi, "Legal Assistance to the Poor . . ." (1975) 27 *Economic and Political Weekly* 1005.
33. For example, both Justice Krishna Iyer and Bhagwati called for thoroughgoing judicial reforms, minimizing reliance on foreign models of adjudication, including the system of *stare decisis*. They advocated return to *swadeshi* jurisprudence including justice by popular tribunals.
34. Baxi, *Politics*, *supra* note 4 at 121-77.
35. *Id.* at 79-120. Also see M. Ghouse, "Constitutional Law" in (1976) XII *A.S.I.L.* 240, 264-74; H. M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus case* (1978).
36. See the balanced account of the viccisitudes of the press during the emergency, D. R. Mankekar & Kamala Mankekar. *Decline and Fall of Indira Gandhi: 19 Months of Emergency* (1977) 88-122.
37. This was, in my opinion, a lasting gain for the free press in India. The sixth general elections witnessed the emergence of the consciousness on the part of many a professional, hard-boiled journalist that the so called "illiterate" "dumb" masses of India, and not the decadent leaders and patrons of the 'free press', held the power to ensure continuance of political freedom in India.
38. The expose of the emergency excesses, highlighted in the day to day proceedings of the Shah Commission and other state level enquiries, created almost an altogether new sensitivity among journalists and correspondents. For the first time, excesses of power against the common people began to be considered newsworthy. People's suffering did not constitute headline, front-page news in the pre-emergency India. The censorship during the emergency also prepared ground for this new sensibility. In the absence of newsworthy stories of political going-on, national newspapers carried on the *front page* stories about the bonded labourers and other related aspects of social tyranny.

    For an overall account of the conditions which fostered the growth of new sensibility in the print media, see Arun Shourie, *The Institutions Under the Janata Rule* (1980) and *Symptoms of Fascism* (1978).
39. See David Selbourne, *An Eye to India* (1979); Shourie, *supra* note 38.

40. The judiciary became, too, an object of the politics of hate in the immediate aftermath of the sixth general elections. See Baxi, *Politics*, *supra* note 4 at 88-98.
41. See, for the text of the Open Letter (1979) 4 S.C.C. (*Jour.*) 17. The review bench declined representation by women's organizations, so irked were some Justices at what they thought to be pressure tactics of the protest march. The bar too was indignant both at the Open Letter and the protest. But Chief Justice Chandrachud not merely publically welcomed such calls for judicial accountability through the "Open Letter" but he also received the women's delegation urbanely and even assured them a timely review, which in the event took nearly two years!
42. Juristic activism involves enunciation of new ideas and techniques perhaps not even urged at the bar, which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law. See Baxi, Introduction to K. K. Mathew, *Democracy, Equality and Freedom* (1978) xxviii.
43. Baxi, *Politics*, *supra* note 4 at 151-66.
44. *Id.* at 233-45; Baxi, *Crisis*, *supra* note 6 at 244-95.
45. *Ibid.*
46. U. Baxi "Developments in Administrative Law" in A. G. Noorani (ed.), *Public Law in India* (1982) and the literature there cited; U. Baxi Introduction to I. P. Massey's *Administrative Law* (1980); *Id.*, *Politics*, 151-66; M. P. Jain. "Justice Bhagwati and Indian Administrative Law" (1980) 16 *Banaras Law Journal* 1.
47. See *supra* notes 42 and 46.
48. *Hussainara Khatoon* v. *State of Bihar* (six interim decisions so far) discussed in U. Baxi, "The Supreme Court Under Trial: Undertrials and the Supreme Court" (1980) 1 S.C.C. (*Jour.*) 35.
49. *Dr. Upendra Baxi* v. *State of Uttar Pradesh*, 1981 (3) SCALE 1136.
50. *Chinnamma Sivdas* v. *State* (*Delhi Administration*), W.P. 2526 of 1982 initiated by Ms. Nandita Haksar, who later also assisted the court by surveying the conditions in the Home as a member of the committee headed by the District Judge, Delhi.
51. *Kadra Pahadiya* v. *State of Bihar*, W.P. 5943 of 1980. See also V. Dhagamwar, "Pahadiya File: A Cry in Wilderness" *Mainstream* Annual (1981), 91.
52. *Ms. Coomi Capoor, Aswini Sarin and Arun Shourie* v. *State of M.P.*, W.P. 2229 of 1981.
53. *Ghanashyam Pardesi* v. *State of Tamil Nadu*, W.P. 2261 of 1980; 3947 of 1981 and 4252 of 1981.
54. *Munna* v. *State of Uttar Pradesh*, W.P. 6 of 1982. (initiated by Krishan Mahajan).
55. *Jyoti Prakash* v. *State of Madhya Pradesh* (May, 1982).
56. *Association for Social Action and Legal Thought* (*ASALT*) v. *The State of Madhya Pradesh*, W.P. 8332 of 1981.
57. Among the lawyers who have individually initiated SAL at the Supreme Court are: Ms. Kapila Hingorani, who brought the undertrial as well as the Bhagalapur blindings cases; Ms. Indira Jaising who is steadfastly insisting on the fundamental right of people in Bombay to live on pavements and Vimal Dave of the Supreme Court Legal Aid Association.

Younger members of the bar seem to have responded more enthusiastically to SAL. Kapil Sibal, notably, helps court no. 2 almost as an institutionalized *amicus*.

58. The CFD is led by Tarkunde, a Senior Advocate of the Supreme Court and a retired Bombay High Court Judge. A veteran fighter for public causes, Tarkunde's ideology is shaped by the radical humanism of M. N. Roy (whose message he is struggling to make relevant to contemporary India) and the laterday thought of Jayprakash Narayan. Tarkunde was in the forefront of leading expose of the torture of Naxalites in Andhra Pradesh and Punjab and in the crusade against the constitutional changes during the emergency. The CFD has intervened in many cases, including notably the Bihar undertrial cases.

59. The PUCL is a body having wide enrolment from cross-section of intelligentia throughout the country. Its members are intellectual activists, most of whom have been *shocked into social action by the trauma* of the emergency. Its leadership includes many leading lawyers, journalists and opposition leaders. The PUCL has investigated many cases of atrocities and corruption. It has chapters throughout India and has potential for emerging as a significant shaper of public opinion and as a pressure group.

60. The PUDR is a breakway group of the PUCL, attracting a more radical social activist membership. It is led by Gobinda Mukhoty, a Senior Advocate of the Supreme Court. A small group of dedicated workers, it is noticeably more active than the PUCL or the CFD. It has produced a large number of reports investigating the conditions of landless and bonded labourers, police and jail atrocities and treatment of political dissenters, including Naxalites. Among the notable SRL brought by the PUDR are: bonded labour cases from Punjab and Haryana and treatment of migrant and contract labourers in the construction of the prestigeous Asian Games stadia in New Delhi.

61. The number of 75 SAL cases is based on a rough count; a more detailed census is on the way with the help of an enthusiastic group of final year law students at Delhi (Ms. Nandita Haksar, Messers Arun Tyagi, Ananta Barua and Shashibhusan Updhayaya).

The category SAL needs careful operationalization. Some senior leaders of the Supreme Court Bar, when approached, maintained that they too have been initiators of "public interest litigation". They have mentioned, among others, the following important cases; *Azad Rickshaw Pullers* v. *Punjab* (1981) 1 S.C.R. 366; *Fertilizer Corp. Kamgar Union, Sindri* v. *Union of India*, (1981) 2 S.C.R. 52; *Municipal Council, Ratlam* v. *Vardichand*, (1981) 1 S.C.R. 47; *R. K. Garg* v. *Union of India*, A.I.R. 1981 S.C. 2138 *A. K. Roy* v. *Union of India*, 1981 (3) SCALE 1601; and *S. P. Gupta* v. *President of India*, 1981 (4) SCALE 1974A. Each one of these cases raised very basic questions; and in most, the Justices resorted to both judicial and juristic activism strategies. Also, public spirited lawyers either *initiated* these matters or participated substantially in these. The present count includes some of these matters as well as some cases conducted by the Supreme Court Legal Aid Committee, headed by Justice D. A. Desai.

The magnitude of the SAL will be high on a liberal operationalization of that notion; all the more so if we were to further include all cases involving corruption in high places in our listing as well. And if one simply went by the criteria of weighty social interests at stake almost every fifth matter on the board of the court will have to qualify as SAL.

My preference at this stage of investigation is to confine SAL to mean: (*i*) court-recourse against repression, terror and torture; (*ii*) activation of judicial power against dominant group exploitation of the specially vulnerable strata of society and (*iii*) assertion of new rights, either *sui generis* or in aid of (*i*) and (*ii*) above.

62. Among the many justifications provided by Justice Bhagwati, the following are important from the present perspectives. First, the rules of law will be "substantially impaired" if "no one can have standing to maintain an action for judicial redress in case of public wrong or public injury". It is "absolutely essential that the rule of law must wean people away from the lawless street and *win them for court of law.*" If breach of public duties was "allowed" to go unredressed by courts on the ground of standing, it would "promote disrespect for rule of law". It will also lead to corruption and encourage inefficiency. It might also create possibilities of the "political machinery" itself becoming "a participant in the misuse or abuse of power". Finally, the newly emergent social and economic rights require new kind of enforcement: *I. M. Chagla* v. *P. Shiv Shankar*, 1981 (4) SCALE 1975 at 1991-92.

63. The petition moved by Ms. Indira Jaising asserts the existence of constitutional fundamental right under art. 21 previously uncontemplated by anyone—namely, the right of pavement dwellers in the city of Greater Bombay to dwell on pavments so long as they do not constitute obstruction to pedestrian and vehicular traffic *on the roads.* It also argues that the state is under corresponding duty to provide them with appropriate house-sites as close as possible to their workplaces.

Incidentally, the argument that state does not have vacant land and therefore cannot perform this duty is not to be taken seriously in this case since just in early 1982 the deposed Chief Minister of Maharashtra (A. R. Antulay, who is also a Bar-at-Law) invited four Justices of the High Court and in the full glare of television cameras at his residence was seen to hand over to judges scrolls of agreement conveying housing sites. The many applicants for the housing scheme include apart from High Court Justices, Chief Justice Chandrachud, Justices P. N. Bhagwati, V. D. Tulzapurkar and D. A. Desai.

So the state has enough land as of date to give away for good causes. Pavement dwellers have an equal, if not greater, moral right to housing (while they manage to exist) as Justices upon their superannuation. And that is in any case what Justice Chandrachud has said, in general terms, in *Kesavananda* (see text accompanying note 28: the 'teeming millions' passage).

64. See U. Baxi, "Laches and the Right to Constitutional Remedies: *Quis Custodiet Ipsos Custodes?*" in A. Jacob (ed.), *Constitutional Developments since Independence* (1975) 559.

65. We here modify Professor Dworkin's felicitous title *Taking Rights Seriously* (1977). Perhaps, in a context like India's one may not take rights seriously if one is unable to take suffering seriously.

66. See *infra* note 77. Also U. Baxi, "Supreme Court under Trial . . .", *supra* note 48 at 49-51.

67. The erosion of the court as an institution did not begin with the 1973 "supersession of judges", but it did accelerate thereafter. During the ten-

ure of Chief Justices Ray and Beg, the court virtually ceased to be an institution and became instead an assembly of individual Justices (see Baxi, *supra* note 42 at x-xi). The intense post-emergency political criticism of Justices Chandrachud and Bhagwati created on the court a perception that Justices who did not participate in the emergency decisions had a 'clean record as against the *emergencywalas;* and some Justices began to act and react as such. This created considerable pressure on the '*emergencywalas*' (improperly so called) to recant and reform; and to demonstrate that they were as good, and even better, libertarians than their colleagues. The conscious policy by the Janata government to elevate those High Court Justices to the Supreme Court who had demonstrated 'political courage' during the emergency reinforced the stereotypes. Now, people, including Justices, have began talking about 'Janata judges' as distinct from the *emergencywalas*. For a general account, see Baxi, *Politics, supra* note 4.

The tensions were getting resolved to tolerable proportions by 1980. But the public disclosure in March 1980 of a letter written by Justice Bhagwati to Indira Gandhi marked the beginnings of an overt conflict between Chief Justice Chandrachud and Justice P. N. Bhagwati. The letter, apart from its sycophantic overtones, contained references to the management of the judicial administration which were readily construed by all and sundry as pointed criticism of the Chief Justice. The bar was quick to exploit this tension and make it grow. A full account of the processes outlined here must await later analysis. But it is necessary to note that to some extent the birth and growth of the social action litigation on the High Bench has been somewhat affected by the malevolent forces seeking to antagonize two of India's most talented and gifted Justices.

68. See *infra*.
69. *Ibid.*
70. Of course, even these directions are also not readily obeyed. Often, they require reiteration by the court and a veiled threat of contempt proceedings by the SAL petitioner. But contempt jurisdiction is, more or less, in disuse in the Supreme Court; also, as full scale strategy to implement judicial directions, it may, if resorted, well prove diversionary and overstrain the already severely strained resources of the SAL petitioner. The court also prefers in SAL matters to nudge the executive, gently now, sternly on other occasions, into postures of compliance. See *Dr. Upendra Baxi* v. *State of Uttar Pradesh, supra* note 49; *Khatri* v. *State of Bihar,* (1981) (2) SCALE 531.
71. The types of innovations required in combating governmental lawlessness and repression require a high degree of collective and sustained judicial activism. The task confronts Justices with a monumental demand on judicial craftspersonship and creativity. It also makes similar demands on the SAL bar, both in terms of strategies of argumentation and of deft manipulation of indigenous and comparative law materials.
72. See *supra* note 62.
73. See the notable analysis of executive privilege in the opinions of Justices Bhagwati, Desai and Tulzapurkar in the High Court Judges case, *supra* note 62.
74. See *infra*.

75. See *supra* note 70
76. *Khatri* v. *State of Bihar supra* note 70. Justice Bhagwati held that to accept this argument would be to "make a mockery of Article 21 and reduce it to nullity, a mere rope of stand . . . ."
77. *Baxi* v. *State of Uttar Pradesh, supra* note 49.
78. In *Baxi* v. *State of Uttar Pradesh, supra* note 49, despite strong strictures, the allegations have not ceased. They still continue to be made on affidavit drawn by state counsel; Professor Lotika Sarkar and I, as petitioners, were irritated and thought of doing something about this. But on mature reflection, we decided that it was no more than a cheap tactics by state counsel to worry us and divert our limited energies to a knowingly false statement on oath. We instead stated in our reply that in India the SAL petitioners are under a duty to face character-assassination in the public interest.
79. In *Association of Social Action and Legal Thought (ASALT) supra* note 56 the counter affidavit of the state showed that there were three enquiries containing the allegation by undertrials that they were rendered impotent by continuous application of electric shocks on penis. These were young persons, some of them just married, arrested under anti-dacoity operations. We had affidavits made by some of them in our hands. When we asked for disclosure of these documents, and the state furnished a massive 300 page affidavit, the sheer bulk of it moved the presiding judge to ask us to apologize to the police for proceedings on a report in the national weekly! The analysis submitted by us on these reports shows that there was no real enquiry even once in the matter! We now await the court's verdict on this. In *Khatri, supra* note 70, just after the court ordered the disclosure of various enquiries made by the state into the blindings episode, the state announced that it has now given consent for a Central Bureau of Investigation enquiry!
80. For example, in *Baxi* v. *State of Uttar Pradesh, supra* note 49, after a year's protracted litigation, the state has itself shown willingness to amend its rules and prescribe new schemes for rehabilitation, thus, in effect, avoiding a decision on merits of the writ petition. In the Bhagalpur blindings case, too, a similar strategy has been followed.
81. In *Hira Lal* v. *Zilla Parishad* (W.P. 1869/80-81) the court asked Krishan Mahajan and myself to conduct a socio-legal investigation on a complaint by chamars that their fundamental right to trade, profession and business was being unreasonably taken away from them (through the system of auctioning to the highest bidder the right in caracass utilization). We submitted a report, based on seven days intensive fieldwork in some sampled villages in Sarasaul block in Kanpur district. We also devised alternate schemes of caracass utilization, after exhaustive discussions with many concerned scientists and developmental administrators. See Upendra Baxi and Krishan Mahajan "*The Chamars and the Supreme Court*" (1981: mimeo). This first experiment seems to have encouraged courts and SAL parties, as well as the state, to further efforts of a similar nature. There is a commission looking into the conditions of migrant bonded labourers in Faridabad brick-klin industries and a team of officials appointed by the court to investigate the alleged violations of labour welfare laws for migrant and contract labour, in the construction of the Asiad stadia and related facilities like the multitude of fly-

overs now "beautifying" New Delhi. See *People's Union for Democratic Rights* v. *Union of India*, A.I.R. 1982 S.C. 1473.

82. In *Baxi* v. *U.P.*, *supra* note 49, the court appointed a panel of physicians and psychiatrists for the inmates of the Home. In *Khatri* extensive investigations were ordered to ascertain the precise agent and scope of blindings by the top ranking eye specialists in India.
83. In *Khatri* v. *Bihar*, *supra* note 70 two batches of separate petitions reached two different benches. The first presided over by the Chief Justice asked the Registrar of the Supreme Court to conduct the investigations in Bhagalpur jail. In the second, Justice Bhagwati expanded the Registrar's mandate somewhat further, while stating that a socio-legal commission would have been a more preferable device.
84. *E.g.*, Justice O. Chinnappa Reddy directed in *Olga Tellis* v. *State of Maharashtra*, the Bombay High Court to appoint an official to hear and investigate the finding of the Municipal Commissioner that pavement dwellers were constituting an obstruction to traffic on the road. No demolition order can be made without this procedure being fulfilled.
85. Kanpur undertrial 'rape' case, *supra* note 54. The court here asked the District Judge (also an ex-officio chairperson of the legal aid board) to investigate and report.
86. The District Judge, Agra, has been performing this role for about a year in *Baxi* v. *Uttar Pradesh*, *supra* note 49. Further proceedings embodying court's appreciation of the several reports made by him are yet to be reported.
87. Baxi, *Politics*, *supra* note 4 at 248-A.
88. See *A. K. Roy* v. *Union of India*, *supra* note 61.
89. *Minerva Mills* v. *Union of India*, A.I.R. 1980 S.C. 1789; *Waman Rao* v. *Union of India*, (1980) 2 S.C.C. 362.
90. See *supra* note 61.
91. *R. K. Garg* v. *Union of India*, *supra* note 61.
92. See *supra* note 89.
93. *Ibid.*
94. Arising out of a remarkable assertion of judicial power in the *Life Insurance Corporation Bonus* case.
95. None seems seriously interested in pressing it just yet. Also, a proper consideration would require a full court; and the court is always working with many vacancies. Technically, there is no reason why thirteen Justices cannot sit and review a decision given by a similar bench. But then this is not at all a 'technical' matter.
96. These powers it always had. And short of elective judiciary, there is really no alternative to executive pre-eminence in judicial appointments in a society like India.
97. This scope of modification consists in the assertion that the opinion of the Chief Justice of India has no 'primacy' over the Chief Justices of High Courts or Governors when their opinions differ on a particular proposal.
98. See U. Baxi, "Appointment of the Chief Justice and Justices of the Supreme Court of India; How Long shall We Evade Real Questions?" (1981; mimeo).
99. *Ibid.*
100. See U. Baxi, *Politics*, *supra* note 4 at 198-209.
101. See U. Baxi, "Legal Mobilization of the Rural Poor" paper presented in March 1982 to ESCAP Seminar on Law and Participation (*mimeo*) for detailed elaboration of this typology.

102. The National Committee on the Implementation of Legal Aid Schemes is shortly establishing an autonomous public interest litigation cell. Several groups of lawyers, mostly young, have started small centres of PIL in some High Courts. The Consumer Education Research Centre, Ahmedabad, is now moving into concerns wider than consumers and is heavily using court process in all its campaigns. Equally active are organisations like the Free Legal Aid Scheme, Rajpipla; Legal Support for the Poor Programmes organized all over India by Harivallabh Parekh; the Free Legal Aid Clinic at Jamshedpur; the Public Interest Litigation Services, Cochin.

103. Of course, the activism in SAL historically arose first in some High Courts, although the caste-view of judiciary in India has so far forbidden explicit recognition of this fact. The Gujarat High Court, notably through Justice M. P. Thakkar, has been a pioneer in this direction.

104. This kind of attitude arose as senior lawyers found that the docket of court no. 2 had decreasing scope for priority to their matters.

105. The matter was thus raised by Murli Bhandari, a Senior Advocate and some time an office bearer of the Supreme Court Bar Association.

106. They also point out that they have undertaken such litigation at their own initiative and cost (of professional time).

107. See Seervai, *Constitutional Law of India* (1979) 2026-27 (second edition). See U. Baxi, *supra* note 7.

108. Seervai's public denouncements after Justice P. N. Bhagwati's opinion in the *Judges* case reveal his deep seated hostility to Justice Bhagwati. He asserts now that one could not have expected any *other* pronouncement from the Justice, since he was the author of the letter to Indira Gandhi. Seervai overlooks the fact that Justice Bhagwati has refused consistently with his earlier opinion, to allow the transfer of High Court Justices. Seervai does not also realize that the best course for him would have been to file a protest at the nomination of Justice Bhagwati as a presiding Judge, had Seervai *honestly* held doubts concerning the judge's integrity. To attack a judge, after arguing a case for over two months, because he failed to hold in favour of counsel, savours of nothing short of blackmail.

109. See *supra* notes 70 and 80.

110. These include multiple petitions in relation to the same subject matter by different persons, inadequate prior research, variable levels of commitment and competence and inability to deal with hardened lawyers, mostly state counsel.

111. The National Legal Aid Committee had the services of Rajeev Dhawan for a report on 'public interest law' in India. Despite my close association with the SAL movement, and despite every research effort, this report (like all government reports) is not available to ordinary mortals. One also fears about its availability upon publication, since most government reports are unpriced and therefore not on sale. See Baxi, *Crisis*, *supra* note 6 at 41-57 on the 'colonial' profile of administration through secrecy.

112. I am indebted to Dr. Rajeev Dhavan for this phrase.

19

THE JUDICIAL UNIVERSE OF MR. JUSTICE KRISHNA IYER

K. M. SHARMA

I

The architects of the Indian Constitution perceived that, for the Republic to survive, the Constitution must be supreme. They also realised that the supremacy of the Constitution depends upon an independent judiciary — one with power to resolve disputes between the states, between the state and the national governments, and, most importantly, between individuals and government. However, in recent years, the Indian Supreme Court has been subjected to much ill-informed and naive criticism. "To distrust the judiciary," Honore Balzac once said, "marks the beginning of the end of society".[1] My object here is not to defend the Supreme Court against these attacks, but to pay tribute to one of its members, Justice V. R. Krishna Iyer, who retired recently, after a little over seven years of distinguished service on the court. While aware of the storms that raged about the court, he welcomed disinterested criticism which stirs in the court a continual awareness of its accomplishments and failures. Justice Krishna Iyer, however, thought of the court as an "institution" and tried hard to reconcile divergent views where he believed their expression would injure the institutional character of the court; he acted not simply to improve the court's image, but, rather, to give strength to the rule of law.

II

It has often been remarked that Indians are the most litigious people in that every great issue is transformed into a question of law. The judge is exalted as lawgiver and prophet in the temple of justice. He must have the wisdom of solomon, the moral vision of Isaiah, the analytic power of Socrates, the intellectual creativity of Aristotle, the humanity of Lincoln and Gandhi, and the impartiality of the Almighty. Measured by these expectations every judge is something of a disappointment. But Justice Krishna Iyer understood the nature of the challenge. A study of his over 300 published opinions and numerous extracurricular writings reveals a picture which is truly unique; they attest to the eloquent constancy with which he has placed his imprimatur on the principles of individual liberty and political equality. Any socially conscious judge, especially in a developing country like India, needs to be resourceful, versatile, and experimental, in relating human problems to a complex background of modernity and tradition. Justice Brandeis once said that a lawyer who has not studied economics and sociology is apt to become a public enemy. Justice Cardozo went further. The law was always a jealous mistress; but nowadays, said Cardozo, she has become "insatiate in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. Those who would earn her best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day. She will not be satisfied with less".[2] Unusually well versed in the Cardozian Kamasutra, Justice Krishna Iyer's experience — a former politician, legislator, administrator, one-time minister, judge of the High Court of Kerala, member of the Law Commission of India — seems to come vibrantly alive in his Supreme Court judgments. Unlike most of his colleagues who had spent their entire public life in the judiciary, Justice Krishna Iyer came to the court after a long and distinguished career as a legislator and politician. And it was this background which most influenced his judicial career. The years in the legislative branch brought with them a general restlessness with the traditional judicial approach to decision making.

Like Lord Denning[3] in England and the late Justice Douglas[4] of the United States Supreme Court, Justice Krishna Iyer has been the champion of the underdog — "the little man" — in securing him justice — social, economic and political. How sensitive his antennae are to what the ordinary man thinks is best illustrated in his recent book,[4a] where he articulates the idea of social justice, as contrasted with the concept of formal justice according to which it was sufficient that the rich and the poor were equal before the law and which ignored the stark reality of economic bargaining power. The state has enlarged its functions; government departments wield wide powers which of necessity restrict individual freedom and, though well-intentioned, may cause harm and distress to the citizen. In Justice Krishna Iyer's view, in modern Indian society the scales must be kept even by the courts — citadels of justice — not only between man and man but also between the citizen and the state.

Thus, in a recent case,[5] he found it distressing that the state, ignoring the constitutional mandate of equal justice to the indigent, sought reversal of the order of the High Court of Haryana which had rightly extended the pauper provisions to auto-accident claims. He was incensed that the state, instead of acting on social justice and generously settling the legitimate claim of a widow and a daughter for the killing of the sole bread-winner by a state transport bus, should be fighting like a "cantankerous litigant even by avoiding adjudication through the device of asking for court-fee from pathetic [victims]".[6]

In yet another case,[7] he chastised the Rajasthan State Road Transport Corporation for its absence of a "sense of safety, accountability and operational responsibility" and regretted the "callous" and "unconscionable" attitude of many state-owned monopolies. The corporation should have sympathised with the victims of the accident rather than tenaciously resisting the claim on flimsy grounds: "What is needed is not callous litigation but greater attention to the efficiency of service, including insistence on competent, cautious and responsible driving".[8]

III

Justice Krishna Iyer has been very skilful in harnessing the potential of an existing decision to support the egalitarian result he seeks to accomplish. One example is the *Maneka Gandhi*[9] interpretation that article 21 ("[N]o person shall be deprived of his life or personal liberty except according to procedure established by law") mandates that "the procedure must be reasonable and fair and not arbitrary or capricious", which overturned the seminal *Gopalan* case[10] and its progeny. This, in effect, converts article 21 into a due process clause.

The long-term ramification of this iconoclastic decision[11] needs to be watched circumspectly for a variety of reasons. First, the court relied on a truncated clarification of *Gopalan* in the *Bank Nationalisation*[12] case. Second, the court ignored that the word "liberty" in article 21 was qualified by the word "personal" deliberately to avoid so wide an interpretation as might include even the freedoms conferred by article 19. Third, couched in negative language, obviously articles 20, 21 and 22 cannot include the freedoms conferred in article 19; it would be incongruous to suppose that freedoms denied to non-citizens by article 19 are nonetheless available to non-citizens under article 21. Fourth, the *Maneka Gandhi* interpretation seriously collides with the unambiguous intention of the framers of the Constitution who preferred the more definite phrase "procedure established by law" in place of "due process" clause, for the power of judicial review implied in the due process clause was thought not only undemocratic (because it gave a few judges the power of vetoing legislation enacted by the elected representatives of the nation) but also threw an unfair burden on the judiciary.[13] Fifth, the new interpretation renders article 22(1) virtually otiose. Admittedly, *Maneka Gandhi* could have been decided on narrower grounds without endowing article 21 with the sweep of an Aladdin's lamp, for the Supreme Court, in view of its great responsibility, should be reluctant to reach beyond the case at hand in formulating the principles of decision.

Indeed, carried away with the exuberance of *Maneka Gandhi,* the court, and particularly Justice Krishna Iyer, has nursed the renaissance of substantive due process, as the new interpretation of article 21 has been extended to include rights to speedy trial,[14] free legal service,[15] bail,[16] at least one appeal,[17] and the horizons of this extension appear limitless. Recently, he extended this broad sweep of article 21 to prohibit the jailing of delinquent debtors for the recovery of debts for to "be poor in this land of Daridra Narayana . . . is no crime".[18] "True," observed Krishna Iyer in a recent case, "our Constitution has no 'due process' clause . . . , but in this branch of law, after [*Bank Nationalisation*] and *Meneka Gandhi* the consequence is the same."[19] That "due process" can be the tool of an activist judiciary raises recurring questions about the proper sources of judicial interpretation and about the proper role of the judiciary in a democracy.

Some recent decisions of the Supreme Court in general and of Justice Krishna Iyer in particular have highlighted the hitherto neglected field of prison jurisprudence:

> Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in the Raj past, need reorientation; prison houses and practices, a hangover of the die-hard retributive ethos, need reconstruction; prisoners, these noiseless, voiceless human heaps, cry for therapeutic technology; and prison justice, after long jurisprudential gestation, must now be reborn through judicial midwifery, if need be. No longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity.[20]

The issue of prison conditions and environment has emerged as one of the predominant themes of correctional philosophy, raising questions concerning inmates' rights and the blight of prison life. For lawful imprisonment limits the constitutional rights of prisoners and pretrial detainees but does not eliminate their rights entirely:

> [I]mprisonment does not spell farewell to fundamental rights although, by a realistic reappraisal, courts will refuse to recognise the full panoply of Part III [fundamental rights] enjoyed by a free citizen.[21]

Courts for many years followed a "hands-off" policy towards prisoners' rights, choosing instead to rely on prison officials' expertise and declining to interfere with internal prison administration. But, in *Charles Sobraj* v. *Superintendent, Central Jail, Tihar*[22] Justice Krishna Iyer delineated the scope of prisoners' constitutionally protected rights, delivering a *coup de grace* to the 'hands-off" doctrine. In his view, the Supreme Court will intervene with prison administration "when constitutional rights or statutory prescriptions are transgressed to the injury of the prisoner [but will decline to do so] where lesser matters of institutional order and management . . . are alone involved".[23] In determining whether a constitutional violation has occurred, the court will give broad recognition to legitimate prison interests in maintaining security and order and in promoting prisoner rehabilitation. And, unless acting to remedy constitutional violations, the court is not to become enmeshed in the minutiae of prison operations.[24] Justice Krishna Iyer has aggressively intervened to ensure that constitutional and "statutory" principles are not forgotten in the treatment of prisoners and that the time-honoured image of the Supreme Court as the palladium of civil liberties is not blunted.

Justice Krishna Iyer's decisions[25] contain a scathing indictment of our prisons, which are often filthy, grossly overcrowded institutions where inmates are denied adequate food, medical attention and provisions for personal hygiene, are constantly subjected to violence from other inmates and guards, and are confined under brutal and dehumanising conditions which impede rehabilitation. (This is largely because governments are unwilling to devote a greater share of scarce resources to the improvement of living conditions for the incarcerated.) The tacit logic of his decisions will rightly require the protection of prisoners from abuses such as racial discrimination,[26] the constant danger of assault by other inmates,[27] solitary confinement,[28] excessive corporal punishment,[29] harsh and degrading jobs,[30] arbitrary decisions regarding prison discipline and punitive transfers,[31] unjustifiable restrictions on the right to practise religion, read, speak, and correspond,[32] and receive legitimate visitors.[33] In a recent case, *Prem Shanker Shukla* v. *Delhi Administration*,[34] he banned the routine handcuffing of prisoners as "a constitutional mandate" and declared the distinction between classes of prisoners as obsolete: "[I]t is arbitrary and irrational to classify prisoners into 'B' class and ordinary class. No one shall be fettered in any form based on superior class differentia, as the law treats them equally".[35] While recognising that handcuffs could be used "where the person is desperate, rowdy or . . . involved in non-bailable offence",[36] Justice Krishna Iyer required that even "in these extreme circumstances [where] handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reasons for doing so. Otherwise, under article 21 the procedure will be unfair and bad in law".[37] To prevent further constitutional deprivations, Justice Krishna Iyer has ordered forms of relief not normally required by the Constitution but nevertheless necessary given the circumstances if the court's efforts are to be successful. Thus, going beyond the court's traditional role, Justice Krishna Iyer has shown a predilection for ordering sweeping institutional reforms of the overall living conditions in the challenged prison, by arguing that article 21 is the jurisdictional root for this legal liberalism. This is true not only in the 'prison justice" area, but in the name of "affirmative action," "remedial jurisprudence", and "processual justice", Justice Krishna Iyer's decisions have been somewhat unconventional in securing the enforcement of the court's mandate.[38] Only an overwhelming orientation to result seems to explain such an approach.

One is greatly impressed, and deeply moved, by Justice Krishna Iyer's remarkable combination of dedicated human feeling with a judicial resourcefulness nothing short of virtuousity in advocating the development of a new sentencing culture, harmonising the needs of crime prevention and humanisation, in accordance with the "[c]onstitutional *karuna* [mercy] . . . injected [by articles 14, 19(5) and 21] into incarceratory strategy to produce prison justice".[39] The rehabilitative ideal thus explains his aversion to capital punishment[40] and the imposition of long and punitive periods of incarceration in virtually all areas of criminal behaviour (except, perhaps, for white collar offences). The underlying rationale is that these crimes — of passion or violence — are the unwilled acts of an accused, products as they are of a decadent social environment, deprivation and a host of related causes. As such, consistent with the concepts of "[*k*]*aruna, daya, prema* and *manavata* [—] concepts of spiritualised humanism secularly implicit in our constitutional preamble,"[41] the primary purpose of prison sentence is "hospital setting and psychic healing, not traumatic suffering"[42] and that "correctional strategy is integral to social defence which is the final justification for punishment of the criminal".[43]

At times, in search of extenuating circumstances, Justice Krishna Iyer has resorted to rather inconsistent rationalisations. Thus, in one rape case, *Phul Singh* v. *State of Haryana,*[44] while reducing the imprisonment from five to two years because of contrition and forgiveness on the part of the accused and the prosecutrix's family, he scapegoats — to borrow his phrase — not the "libidinous brachmachari" but the present-day decadent social environment. He is hopeful that the "aphrodisiac overflow" and "erotic aberration" of this "philanderer of 22 overpowered by sex stress in excess" will wither away as a result of meditational therapy rather than punitive sanctions.[45]

Justice Krishna Iyer used the same kind of astonishing reasoning in commuting the death sentence of an accused (Kunjukunju) even though the fact-situation involved a calculated, preplanned brutalising murder of his wife and two children to facilitate his extramarital liaison.[46]

Similarly, in *V. C. Rangadurai* v. *D. Gopalan,*[47] involving a case of grave professional misconduct by a lawyer who would have been debarred by the State Bar Council (instead of suspension from practice for six years) but for his young age — and whose suspension was further reduced by the Bar Council of India to one year —, Justice Krishna Iyer reinstated his right to practise on an "understanding to serve the poor" by participating in a legal aid scheme operating in Tamil Nadu. Apart from the disservice such an unrealistically lenient view does by way of deterring professional misconduct and improving the public trust in the legal profession, such a direction was statutorily suspect. Thus, the anxieties and concerns expressed by Justice Sen[48] are preferable to the misplaced sympathy of Justice Krishna Iyer.

It appears, however, that Justice Krishna Iyer would not extend the same degree of correctional sensitivity to white collar criminals[49] and to those violating strict liability offences. For example, in *Pyarali K. Tejani* v. *Mahadeo Ramchandra Dange*[50] where the accused argued that he believed in good faith that there was no cyclamate in the scented *supari* sold (induced by the warranty) and honestly did not know that saccharin was contraband (the rules thereof having been changed frequently), Justice Krishna Iyer tartly replied: "It is trite law that in food offences strict liability is the rule not merely under the Indian [Prevention of Food Adulteration

Act, 1954] but all the world over".[51] Therefore, he stressed that nothing more than *actus reus* was needed where regulation of private activity in vulnerable areas like public health was intended: "[I]ntention to commit a breach of statute need not be shown. The breach in fact is enough".[52] True, the protection and welfare of the society were the paramount concerns that Justice Krishna Iyer invoked in favour of strict liability, but, surely, the recognition of a *bona fide* mistake especially in view of the ever-changing rules contrabanding and discontrabanding saccharin would not have been incompatible with correctional goals. Would not a procedure that fails to allow a proof of *bona fide* regulations properly fall short of the requirements of *Maneka Gandhi?*

The role of strict liability in combating socio-economic offences has received unqualified support in the judgments of Justice Krishna Iyer. This is further revealed in *Kishan Trimbak* v. *State of Maharashtra*[53] where the accused, pleading guilty to storing for sale adulterated buffalo milk (with 16.3 per cent fat deficiency and 17.8 per cent added water) and also for misbranding it as cow milk, successfully persuaded the trial court to treat them leniently, because their large family of fifteen survived on paltry profits from their small restaurant. The trial court fined them nominally adding that the adulteration, being only of water, "was not injurious to human health". Justice Krishna Iyer affirming the High Court's enhancement of punishment to six months imprisonment plus monetary fine of Rs. 500 each, condemned the "magisterial indulgence [leniency] when society is the victim and the stakes are human health, and, perhaps, many lives [and recognised] that the mandate of humanist jurisprudence is sometimes harsh".[54] Analysing the reasons underlying the imposition of absolute liability for food adulteration, Justice Krishna Iyer observed:

> Adulteration of food is so dangerous and widespread and has so often led to large human tragedies, sudden or slow, insidious or open, that social defence compels casting of absolute liability on the criminal, even if the particular offence is committed with an unsuspecting *mens*. To take risk in the name of very gullible dealers or very ignorant distributors, when the consequences may spell disaster on innocent victims, few or many, is legislative lackadaisical conduct, giving the widest hostage to fortune. So it is that *mens rea* is excluded and the proof of *actus* [*reus*] is often enough. The story of small restauranteurs unwittingly vending milk, as is alleged here, is irrelevant to culpability.[55]

Not only this; Justice Krishna Iyer has severely criticised the use of "plea bargaining", "plea negotiation", and "trading out" — in an overt or covert form — in the disposition of economic offences. Thus, in *Murlidhar Meghraj Loya* v. *State of Maharashtra*[56] where the accused was sentenced to a fine of Rs. 500 upon quickly pleading guilty to an offence of food adulteration, to Justice Krishna Iyer, the whole process in the trial court strongly smacked of a tripartite consensual agreement reminiscent of the "plea-bargaining" procedures:

> It is idle to speculate on the virtue of negotiated settlements . . . in the United States, but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law.[57]

Justice Krishna Iyer has almost consistently exhibited a predisposition toward the doctrine of strict liability in the realm of socio-economic and other regulatory legislation[58] and has tabooed subtle technicalities of law for protecting and furthering social welfare:

> Any narrow and pedantic, literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefiting accused persons and defeating criminal statutes calculated to protect the public health and the nation's wealth.[59]

IV

This judicial engineering leads one to ask: How should our Supreme Court judges determine hard cases — not just in constitutional matters. After all, the Supreme Court should not be a mere switching station for efficient disposition of cases but rather a forum for the thoughtful and wise elucidation of national law and policy. By the time any non-constitutional case reaches the Supreme Court there are generally two fairly respectable views of what the law should be, how a statute should be interpreted, how a common law rule should be manicured. There seem to be three approaches, none of them mutually exclusive: *First* is the recognition that, given the democratic nature of our nation, the view of Parliament as to what is constitutional is worthy of the highest respect. A *second* view would be to accord *certainty* and *predictability* very high priorities in constitutional interpretation. Previous decisions of the Supreme Court, unless manifestly wrong, should be retained and in no event overturned on a slender majority. Changes should be evolved from the principles inherent in previous decisions. The judge should seek to apply not his own view of what the Constitution means, but rather that derived from the principles of construction and interpretation previously established. *Thirdly,* it may be argued that a judge's task being to apply the Constitution and not the judicial decisions, he should always examine the Constitution afresh and, in the light of his own philosophy, develop his principles to interpret it.

All three approaches are defensible. Justice Krishna Iyer clearly prefers the third, as do some other judges. Most lawyers would consider the second approach most appropriate in that a judge must resist all temptations to implement his personal vision of the just society — except to the extent that his vision is consistent with the law as it evolves in response to social changes. This self-restraint is the very soul of judicial impartiality. Ideally, the losing party should feel that he is not the victim of the court, but simply the object of a process that is the same for all. The first approach of deference to Parliament is not one favoured by many judges. Most use a mixture of the second and third approaches, drawing on precedent when is suits them.[60]

Oftentimes, Justice Krishna Iyer has been relatively more deferential to the legislative intent: "A return to the rules of strict construction, when the purpose of the statute needs it, is desirable, especially with a view to give effect to the intention of the legislature".[61] Thus, he has gone into the *travaux preparatoires* — legislative background and objects of statutes dealing with such diverse issues as prohibition,[62] rent control,[63] contempt jurisprudence,[64] labour-management relations,[65] sentencing[66] — to discover the true objective of the enactment, but the overriding concern is his unabashed objective of achieving a socially desirable result. "Until specific legislative mandates emerge from Parliament, the court may mould the old but not make the new law. Interstitially from the molar to the molecular' is the limited legislative role of the court, as Justice Holmes said . . .".[67] This approach, perhaps acknowledging the undemocratic character of judicial review, cautions the judge to exercise great self-restraint when confronted with opportunities to sit in judgment on the policy decisions of elected officials.

V

But for the passionate intensity of an unswerving commitment to a viewpoint that inspires him to resort to ornate phraseological flourishes (uncommon in conventional legal expression) and marshalling of abundant literature (even though a potpourri of unsynthesised *disjecta membra*), Justice Krishna Iyer's *reasoning* would retain a vigour it will be difficult to controvert. Unfortunately, a virtual absence of any meaningful tradition of judicial biographies in India inhibits any search for shaping influences as to why a truly progressive, hauntingly compelling, courageous and result-oriented judge — who is not oblivious to the craft of precision[68] and the vice of prolixity[69] — should find himself caught up in the web of these very infirmities? The few extant biographies, notably by Vidya Dhar Mahajan, are mostly in the form of uncritical — and oftentimes sychophantic — adorations of the jurists involved.[70] As such, they are not instructive enough in offering any meaningful insights into the outlook and philosophy of the judge on various facets of judicial process and decisionmaking.

On the contrary, in the United States, a tradition of such steadily increasing studies has progressed from simple biographies[71] to studies relating to "role analysis" of judicial behaviour[72] to highly controversial studies penetrating the secrecy of the judicial process[73] to a recent psychobiography of a distinguished judge.[74] American legal realism — which began to be influential in the 1920s and continue to dominate jurisprudential thinking to this day — highlighted that judges were people whose opinions reflected their individual passions, their group biases, their economic self-interest and their political preferences.[75] For example, drawing heavily upon the psychodynamic theories of such analysts as Erik H. Erikson[76] and Karen Horney,[77] Professor Hirsch attempts to penetrate the psyche of one of the most interesting, complex and controversial personalities ever to grace the United States Supreme Court bench, "perhaps the most influential jurist of the twentieth century".[78] If such a psychobiography were available for a judge like Justice Krishna Iyer — and he would be a fascinating subject for a psychobiography — we would perhaps be aided in understanding the "philosophy," "writing style," "value orientations" by knowing more about the man, the judge and the philosopher.

Though personally vehemently critical of judicial grandiloquence in any form,[79] we would regard it equally unjust to let it alone become a barrier to recognising the great contributions — ideational as well as functional — of a truly sincere judge, for the lines between "illuminating judicial prose" and "a novel style of expression" are tenuous and often blurred. In deference to a judicial tenure — illustrious for its marked candour, bold creativity, correctional humanism, and a missionary zeal to do justice — the linguistic profligacies of Justice Krishna Iyer could be viewed by a grateful legal profession as a tolerable flirtation with glossary and words — a lyrical romance not being easily amenable to settling down to some cooler form of regard.

Regrettably, nevertheless, a counterproductive debate has engaged the wits of a distinguished judge of the Supreme Court, Justice Tulzapurkar,[80] and the author of a well-known commentary on the Constitution of India, H. M. Seervai.[81] Could the learned justice, may one ask, not have voiced his admittedly understandable concerns to his "esteemed brother" Justice Krishna Iyer privately rather than using the embarrassing medium of a judicial opinion? What is even more revealing is that a discussion of such issues constitutes an *idee maitresse* of constitutional law, sometimes with the malicious pleasure of the self-righteous. The latest to intrude in this controversy is Justice O. Chinnappa Reddy, presumably, in defence of his erstwhile colleague, which is equally regrettable.[82]

This apostolic apoplexy aside, it should be recognised *en passant* that, judged by ideal standards, the writing style of a good number of Supreme Court judges is not the model of excellence. Apart from the intellectual limitations of particular judges, this malady is exacerbated because our judges are monstrously overworked, having little or no time to revise their draft opinions either to make them concise or linguistically flawless. (Pascal once apologised to one of his friends for writing a long letter, but pleaded lack of time to write a short one. Paradoxical though it may seem, it takes much longer to write a short piece.) More particularly, a virtual absence of written briefs and arguments — in preference to endless and oftentimes somnolent oral arguments — has deprived the judges of any assistance in the preparation of their opinions — opinions that are as invulnerable and persuasive as they can be made by research, reflection, collaboration, mutual criticism and accommodation. The caseload of the Supreme Court presents a truly formidable problem for the effective performance of that function. The ability to write precisely but powerfully is essential; a judge chained to his caseload cannot develop what has been aptly called "the spacious reflection so indispensable for wise judgment".[83]

The very flamboyance of Justice Krishna Iyer's style may obscure his merit and his significance. Spurning judicial caution, he drafted his pronouncements with grand broad strokes, sometimes with so relatively little regard for the case at hand that he could be accounted something less or even something other than a judge. Justice

Krishna Iyer was the fighting-crusading lawyer, contentious to a fault. Thus, impatience with social injustices invariably led him to infuse his judgments with lavish *obiter dicta*, presumably, to sensitise the government into taking remedial steps, either for the amelioration of the conditions of prisonners,[84] juvenile delinquents,[85] and deserted wives,[86] enactment of a nationwide no-fault scheme,[87] defining what is an "industry,"[88] victim reparation,[89] eradication of corruption,[90] adoption of class actions,[91] independence of the judiciary,[92] rent control,[93] introduction of non-judicial modes of dispute settlement,[94] electoral law reform,[95] effective access to justice;[96] and the need to explore new techniques for solving and dissolving the perpetual crises in human relations — whether those techniques be found in law, social welfare programmes, economics, criminology,[97] or transcendental meditation.[98] The sweep of his concerns is thus immense.

Despite the fact that on the whole the work of the Supreme Court is commendably done, unfortunate and unintended dicta can oftentimes spawn regrettable results in the lower courts or lead to uncertainty in the planning of the public and private sectors. To some extent this malady is controlled by the canon of precedent which pays less heed to unnecessary comments of judges than the actual holdings of cases. But in the Indian context, strictly speaking, the technique raises problems in that some Supreme Court *obiter dicta* may bind lower courts.[99] But Justice Krishna Iyer's deep humanism and irrepressible desire to do justice overrode such considerations.

In the same vein, "access to justice" has been the credo of Justice Krishna Iyer's constitutional faith, explaining his recalcitrance toward a narrowing of the requirements of "standing," *"locus standi,"* "proper party plaintiff" and "aggrieved person" through a restrictive interpretation of articles 32 and 136.[100] It is not disputed that a person who has a real stake in the outcome of a litigation or a proceeding should not be denied access to justice. But the court should proceed with a considerable degree of circumspection toward liberalising the requirement of "standing"; otherwise, our already clogged dockets will be swelled beyond belief. Justice Krishna Iyer's view in *Bar Council of Maharashtra* v. *M. V. Dabholkar*[101] is more idealistic: "The possible apprehension that widening of legal standing with a public connotation may unloose a flood of litigation which may overwhelm the judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system".[102] The empirical experience from England, Australia and the United States which Justice Krishna Iyer often invokes has been just to the contrary and in any way is of little relevance to Indian conditions. There is thus great merit in the observation of Justice Pathak in *P. S. Sadhanantham* v. *Arunachalam*,[103] that the widest conceivable range of discretionary jurisdiction conferred by article 136 on the Supreme Court to "grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India" is nevertheless subject to a limitation "in built into the jurisdiction of the Court [which] flows from the nature and character of the case intended to be brought before the Court [and] requires compliance despite the apparent plenitude of power vested in the Court [under article 136]".[104] Justice Krishna Iyer is equally generous in enlarging the doctrine of "State action.".[105]

Within the confining brevity of the foregoing fragmented sampling the extraordinarily variegated contribution of Justice Krishna Iyer can hardly be encapsulated, requiring as it does a full book-length treatment. But one thing is clear. Justice Krishna Iyer rejected the austerity and detachment traditionally imposed upon a judge; he never became a prisoner of dogma but gave legal vitality to new approaches over the widest spectrum of social ills. Thus, an activist sense of responsibility for the goals of laws and a proclivity to play policymaker have been the hallmarks in the judicial universe of Justice Krishna Iyer. His justification is that judicial activism strengthens Indian democracy, particularly when the courts are spurred by the conviction that legislative processes and administrative agencies have failed to bring society closer to the meaning of its constitutional values. The magnitude of his contribution to the law through the human and perceptive exegesis of the text of the Constitution is enormous, enduring and widely acknowledged. Moreover, the jurist is an accomplished scholar and one cannot help but admire his judicial statesmanship (he rarely wrote a dissent),[106] his depth of concern for humanity, his broad social vision, his eclectic knowledge of law, literature, history, philosophy, and the social sciences, and his Solomonic wisdom.[107]

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36. *Id.* at 1541.
37. *Id.* at 1543.
38. See, *e.g.*, *Municipal Council, Ratlam* v. *Vardhichand*, A.I.R. 1980 S.C. 1622, 1630-31 (ordering the Ratlam Municipality to construct a large number of latrines in three months; *State of Kerala* v. *T. P. Roshana*, A.I.R. 1979 S.C. 765 (ordering the admission of thirty additional students in a medical college on an ad hoc basis).
39. *Charles Sobraj* v. *Superintendent, Central Jail, Tihar*, *supra* note 21 at 1516.
40. For a perceptive analysis of Justice Krishna Iyer's efforts to avoid death sentence through judicial fiat see A. R. Blackshield, "Capital Punishment in India" (1979) 21 *J.I.L.I.* 137. However, it should not go unnoticed that for some exceptional situations (*viz.*, anti-social offences, white collar offences and die-hard incorrigible murderers) Justice Krishna Iyer will tolerate the retention of the death penalty, as is evident from his observations in *Rajendra Prasad* v. *State of Uttar Pradesh*, A.I.R. 1979 S.C. 916, 932-33. See also *Ediga Anamma* v. *State of Andhra Pradesh*, A.I.R. 1974 S.C. 799 and *Bishan Dass* v. *State of Punjab*, A.I.R. 1975 S.C. 573, 574 (where the crime is "cruel and inhuman" and the "consequential deaths dastardly and pathetic" a death sentence may be called for). These are, however, the personal views of Justice Krishna Iyer and at present do not constitute the law in India. In *Bachan Singh* v. *State of Punjab*, A.I.R. 1980 S.C. 898, the Supreme Court recently upheld the constitutionality of the death penalty.
41. *Maru Ram* v. *Union of India*, A.I.R. 1980 S.C. 2147, 2162.
42. *Ibid.*
43. *Ibid.* See also *Ved Prakash* v. *State of Haryana*, A.I.R. 1981 S.C. 643.
44. A.I.R. 1980 S.C. 249.
45. *Id.* at 250.
46. *Rajendra Prasad* v. *State of Uttar Pradesh*, A.I.R. 1979 S.C. 916, 943.
47. A.I.R. 1979 S.C. 281.
48. *Id.* at 288-89.
49. See, *e.g.*, *Som Prakash* v. *State of Delhi*, A.I.R. 1974 S.C. 989, 994 and *Balkrishna Chhaganlal Soni* v. *State of West Bengal*, A.I.R. 1974 S.C. 120, 121, 124-25, where he refused to vary the punishment. Similarly, in *Suresh Chandra* v. *State of Gujarat*, A.I.R. 1976 S.C. 2462, involving a small official in a Sales Tax department who was trapped into taking a Rs. 100 bribe and sentenced under section 5(2) of the Prevention of Corruption Act, Justice Krishna Iyer observed: "The watershed of pollution in the administration cannot be permitted to be crossed by misconceived judicial compassion or high level executive indifference." *Id.* at 2643. To us the *Rangadurai* situation, *supra* note 47, looks far more serious in the area of corruption (involving as it did a lawyer) deserving of severe punishment than the situation of *Suresh Chandra* involving a petty clerk. It is

hard to explain these contradictions except to suggest that Justice Krishna Iyer has tried to temper justice with mercy whenever it has been possible to do so in terms of his own value judgments.

50. A.I.R. 1974 S.C. 228.
51. *Id.* at 234. This is rather overstated.
52. A.I.R. 1974 S.C. at 234, quoting Lord Wright in *McLeod* v. *Buchanan* [1940] 2 All E.R. 179, 186 (H.L.).
53. A.I.R. 1977 S.C. 435.
54. *Id.* at 437.
55. *Id.* at 438.
56. A.I.R. 1976 S.C. 1929.
57. *Id.* at 1933. This criticism is again repeated in *Kishan Trimbak* v. *State of Maharashtra*, A.I.R. 1977 S.C. 435, 437.
58. The reason is obvious. As the Law Commission of India, *Forty-Seventh Report on the Trial and Punishment of Social and Economic Offences* (1972) 2, of which Justice Krishna Iyer was a member, observed the *modus operandi*, the nature and the consequences of these crimes are such that an inquiry of *mens rea* is rendered redundant.
59. A.I.R. 1976 S.C. 1932.
60. Justice Krishna Iyer is no exception to this precendential pragmatism. See, *e.g.*, *Life Insurance Corporation of India* v. *D. J. Bahadur*, A.I.R. 1980 S.C. 2181, 2198: "The catena of cases we have briefly catalogued discloses an unbroken stream of case-law binding on this Court, the ratio whereof, even otherwise, commends itself to us."
61. *Authorised Officer, Thanjavur* v. *S. Naganatha Ayyar*, A.I.R. 1979 S.C. 1487, 1492; see also *Avinder Singh* v. *State of Punjab*, A.I.R. 1979 S.C. 321; *Carew and Company* v. *Union of India*, A.I.R. 1975 S.C. 2260, 2270.
62. See, *e.g.*, *P. N. Kaushal* v. *Union of India*. A.I.R. 1978 S.C. 1457.
63. See *e.g.*. *Sant Ram* v. *Rajender Lal*, A.I.R. 1978 S.C. 1601.
64. *Union of India* v. *Satish Chandra*, A.I.R. 1980 S.C. 600; *In re S. Mulgaokar*, A.I.R. 1978 S.C. 727, 735; see also *Baradakanta Mishra* v. *Registrar of Orissa High Court*, A.I.R. 1974 S.C. 710, 726 (concurring).
65. *Mumbai Kamgar Sabha* v. *Abdulbhai Faizullabhai*, A.I.R. 1976 S.C. 1455, 1466 (history of the Payment of Bonus Act, 1965, traced); *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*, A.I.R. 1978 S.C. 548, 596 and *Life Insurance Corporation of India* v. *D. J. Bahadur*, A.I.R. 1980 S.C. 2181, 2191, 2199-2202 (objectives of the Industrial Disputes Act, 1947, reviewed); *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, A.I.R. 1980 S.C. 1896, 1918-19, 1921-22 (legislative background of section 11A of the Industrial Disputes Act, 1947, examined).
66. *Maru Ram* v. *Union of India*, A.I.R. 1980 S.C. 2147, 2153-54.
67. *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, A.I.R. 1980 S.C. 1896, 1909. See also *id.* at 1919: "It is increasingly important for developing countries, where legislative transformation of the economic order is an urgent item on the national agenda, to have the judiciary play a meaningful role in the constitutional revolution without fretting out flaws in the draftsman, once the object and effect are plain. Judges may not be too 'anglophonic' lest the system fail."
68. *Carew and Company Ltd.* v. *Union of India*, *supra* note 61 at 2268 (recommends the use of Brandeis brief); *Sunil Batra* v. *Delhi Administration [No. 1]*, *supra* note 15 at 1694 (need of Brandeis briefs stressed to understand prison tensions); *Chitan J. Vaswani* v. *State of West Bengal*,

A.I.R. 1975 S.C. 2473 (deplores poor draftsmanship in the statute relating to suppression of immoral traffic in women and girls); *Murlidhar Meghraj Loya* v. *State of Maharashtra*, A.I.R. 1976 S.C. 1929, 1933 (deplores "the clumsy draftsmanship displayed in a statute [Prevention of Food Adulteration] which affects the common man" and, lamenting that unfortunately "easy comprehensibility and simplicity for the laity are discarded sometimes through over-sophisticated scholarship in . . . drawing up legislative bills," stresses that a "new orientation for drafting methodology adopting directness of language and avoiding involved reference and obscurity is overdue"). See also *State of Madhya Pradesh* v. *Ram Ragubir*, A.I.R. 1979 S.C. 888, 890; *Aluminium Corporation of India* v. *Union of India*, A.I.R. 1975 S.C. 2279, 2283-84.

69. See, *e.g.*, *Babubhai* v. *Nandlal*, A.I.R. 1974 S.C. 2105, 2115; *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, *supra* note 67 at 1902:

> Mercifully counsel abbreviated their oral arguments into an eight-day exercise, sparing us the sparring marathan of twenty-eight laborious days through which the case stretched out in the High Court [of Gujarat].
>
> Orality *ad libitum* may be the genius of Victorian era advocacy but in our "needy" Republic with crowded dockets, forensic brevity is a necessity. The Bench and the Bar must fabricate a new short-hand form of court methodology which will do justice to the pockets of the poor who seek . . . justice and to the limited judicial hours humanely available to the court if the delivery system of justice is not to suffer obsolescence.

See also *P. N. Eswara Iyer* v. *Registrar, Supreme Court of India*, A.I.R. 1980 S.C. 808, where Justice Krishna Iyer, sustaining the validity of an amended rule of the Supreme Court which excluded oral hearing in relation to a review application, observed that an oral hearing is not an essential requirement for all types of cases.

70. V. Mahajan, *Chief Justice Gajendragadkar* (1966); V. Mahajan, *Chief Justice K. Subba Rao* (1967); V. Mahajan, *Chief Justice Mehr Chand Mahajan* (1969); K. Gauba, *The Rt. Hon'ble Sir Shadi Lal* (1934). See, likewise, M. Hidayatullah, *My Own Boswell* (1980).

71. It is not attempted to catalogue here all the judicial biographies published. That would be a formidable task, indeed. However, see *e.g.*, L. Friedman & F. Israel (eds.), *The Justices of the United States Supreme Court: Their Lives and Major Opinions 1789-1969* (1969 vols. 1-4); L. Friedman (ed.); *1969-1978* (1978 vol. 5). Some recently published biographies include F. Stites, *John Marshall: Defender of the Constitution* (1981); M. Urofsky, *Louis D. Brandeis and the Progressive Tradition* (1981); J. Simon, *supra* note 4.

72. See, *e.g.*, G. Schubert, *Quantitative Analysis of Judicial Behavior* (1959); G. Schubert (ed.), *Judicial Decision-Making* (1963); G. Schubert, *The Judicial Mind* (1965); G. Schubert, *Judicial Policy-Making* (1965); C. Pritchett, *Civil Liberties and the Vinson Court* (1954); Grossman, "Role-Playing and the Analysis of Judicial Behavior: The Case of Mr. Justice Frankfurter," (1962) 11 *J. Pub. L.* 285; Grossman, "Dissenting Blocks on the Warren Court: A Study in Judicial Role Behavior," (1968) 30 *J. Pol.* 1068; Howard, "Role Perceptions and Behavior in Three U.S. Court of Appeals", (1977) 39 *J. Pol.* 916; Gibson, "Judges' Role Orientations, Attitudes, and Decisions," (1978) 72 *Am. Pol. Sci. Rev.* 911.

73. See, *e.g.*, R. Woodward and S. Armstrong, *The Brethren*: *Inside the Supreme Court* (1979); B. Murphy, "Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter," (1980) 69 *Geo. L.J.* 101; B. Murphy, *Justices as Politicians*: *The Extrajudicial Activities of Louis D. Brandeis and Felix Frankfurter* (1982); D. Provine, *Case Selection in the United States Supreme Court* (1980).
74. H. N. Hirsch, *The Enigma of Felix Frankfurter* (1981).
75. See, *e.g.*, W. Rumble, *American Legal Realism* (1968); Savarese, "American Legal Realism," (1965) 3 *Houston L. Rev.* 180.
76. E. Erikson, "The Problem of Ego Identity," (1956) 4 *J. Am. Psychoanalytic Ass'n* 56; E. Erikson, *Childhood and Society* (1963). Erikson applied his psychological interpretations to a political biography of Mahatma Gandhi, E. Erikson, *Gandhi's Truth* (1969), with impressive success.
77. K. Horney, *Neurosis and Human Growth* (1950).
78. H. N. Hirsch, *supra* note 74, at 3.
79. K. M. Sharma, "Judicial Grandiloquence in India: Would Fewer Words and Shorter Oral Arguments Make for Better Judgments," (1973) 4 *Lawasia* 192.
80. In *Manohar Nathusao Samarth* v. *Marotrao*, A.I.R. 1979 S.C. 1084, 1090, Justice Tulzapurkar criticised the writing style and the contents (expressing personal theories and views) of Justice Krishna Iyer: "[P]refaces and exordial exercises, perorations and sermons as also theses and philosophies (political or social), whether couched in flowery language or language that needs simplification have ordinarily no proper place in judicial pronouncements [and] day in and day out indulgence in these in almost every judgment irrespective of whether the subject or the context or the occasion demands it or not, . . . becomes indefensible. . . ." *Id.* at 1095. This prompted the latter's retort in *Organo Chemical Industries* v. *Union of India*, A.I.R. 1979 S.C. 1803, 1804.
81. H. M. Seervai, III *Constitutional Law of India* (1979 2nd ed.) vii, 1871-80, 2026-29.
82. O. Chinnappa Reddy, "Foreword" to V. Krishna Iyer, *Justice and Beyond* (1980) 4. For a spirited defence of Justice Krishna Iyer's writing style, see *Nambiyar*, "Mr. Jethmalani and 'Judicial Gobbledygook,'" (1974) 1 S.C.C. [*Jour.*] 68.
83. Frankfurter, "Distribution of Judicial Power Between United States and State Courts," (1928) 13 *Corn. L.Q.* 499, 504. *Cf.*, Justice Krishna Iyer's perceptive dicta in *Life Insurance Corporation of India* v. *D. J. Bahadur*, *supra* note 60 at 2183-84: "[W]hen important issues demand the Court's collective judgment, an informed meeting of instructed minds . . . is a *sine qua non*. But [a] torrent of litigation . . . drowns the judges in the daily drudgery of accumulated dockets. To gain leisure for fundamental reflections with some respite from paper-logged existence and supportive research from trained law clerks is a 'consummation devoutly to be wished' if the final Court is to fulfil its tryst with the Constitution and the country."
84. *Moti Ram* v. *State of Madhya Pradesh*, A.I.R. 1978 S.C. 1594, 1601 (urges revision of bail laws); *Sunil Batra* v. *Delhi Administration* [*No. 1*], *supra* note 15 at 1724-26.
85. *Ram Prasad Sahu* v. *State of Bihar*, A.I.R. 1980 S.C. 83, 84.
86. See, *e.g.*, *Bai Tahira* v. *Ali Hussain Fissalli Chothia*, A.I.R. 1979 S.C. 362; *Ramesh Chander* v. *Veena Kaushal*, A.I.R. 1978 S.C. 1807.

87. *State of Haryana* v. *Darshana Devi*, A.I.R. 1979 S.C. 855, 857.
88. *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*, A.I.R. 1978 S.C. 548, 558: "This obiter exercise is in discharge of the Court['s] obligation to inform the community in our developing country where to look for the faults in the legal order and how to take meaningful corrective measures. The "[c]ourts too have a constituency—the nation—and a manifesto—the Constitution. That is the validation of this divagation." See also *Life Insurance Corporation of India* v. *D. J. Bahadur*, *supra* note 60 at 2189.
89. See, *e.g.*, *Rattan Singh* v. *State of Punjab*, A.I.R. 1980 S.C. 84, 86.
90. See *e.g.*, *Mohammed Aslam* v. *State of Uttar Pradesh*, A.I.R. 1976 S.C. 2529, 2533.
91. See notes 100-02 *infra* and the accompanying text.
92. See, *e.g.*, *Union of India* v. *Sankalchand*, A.I.R. 1977 S.C. 2328, 2366.
93. *Busching Schmitz* v. *Menghani*, A.I.R. 1977 S.C. 1569, 1579.
94. *Mumbai Kamgar Sabha* v. *Abdulbhai Faizullabhai*, *supra* note 65 at 1470 (recommends "conciliation" and "mediation"); *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha*, *supra* note 67 at 1908 ("overjudicialised" and "underprofessionalised" industrial law needs to be replaced by "specialised processual expertise and agencies" defeating as it does effective and equitable solution of labour-management disputes), see also *id.* at 1935-36; V. Krishna Iyer, *Perspectives in Criminology, Law and Social Change* (1980) 102-03; V. Krishna Iyer, "Nyaya Panchayats in Retrospect and Prospect," in *Of Law and Life* (1979) 116.
95. *Jugal Kishore Patnaik* v. *Ratnakar Mohanty*, A.I.R. 1976 S.C. 2130, 2134 (concurring) (dicta); see also *Mohinder Singh* v. *Chief Election Commissioner*, A.I.R. 1978 S.C. 851.
96. *Central Coal Fields* v. *Jaiswal Coal Co.*, A.I.R. 1980 S.C. 2125, 2126 (court fees should not result in denial of effective access to justice and equality in terms of articles 39A and 14 of the Constitution, respectively); *S. K. Sen* v. *State of Bihar*, A.I.R. 1975 S.C. 1185, 1187 ("processual punctilliousness" condemned as the end-product of equality and good conscience stood sacrificed). See also notes 100-02 *infra* and the accompanying text.
97. *Mohammed Giasuddin* v. *State of Andhra Pradesh*, A.I.R. 1977 S.C. 1926; *Inder Singh* v. *Delhi Administration*, A.I.R. 1978 S.C. 1093; *Lingala Vijay Kumar* v. *Public Prosecutor, Andhra Pradesh*, A.I.R. 1978 S.C. 1485.
98. See, *e.g.*, *Hiralal Mallick* v. *State Bihar*, A.I.R. 1977 S.C. 2236, 2243-44; *Sunil Batra* v. *Delhi Administration* [*No. 2*], *supra* note 25 at 1600-01, 1603-04; *Maru Ram* v. *Union of India*, A.I.R. 1980 S.C. 2147, 2165, 2166; *Rajendra Prasad* v. *State of Uttar Pradesh*, A.I.R. 1979 S.C. 916, 944; *Mohammed Giasuddin* v. *State of Andhra Pradesh*, A.I.R. 1977 S.C. 1926, 1934, 1935.
99. See, *e.g.*, J. C. Saxena, "The Doctrine of Precedent in India: A Study of Some of Its Aspects," (1964) 3 *Jaipur L.J.* 188, 205-13; also in G. S. Sharma (ed.), *Essays in Indian Jurisprudence* (1964) 110, 127-36.
100. See generally *A.B.S.K. Sangh (Rly.)* *v.* *Union of India*, A.I.R. 1981 S.C. 298, 317; *Fertilizer Corporation Kamgar Union* v. *Union of India*, A.I.R. 1981 S.C. 344, 351.
101. A.I.R. 1975 S.C. 2092, 2102.
102. *Id.* at 2106. However, five years later in *Baleshwar Dass* v. *State of Bihar*, A.I.R. 1981 S.C. 42, 42-43, we encounter a diametrically inconsistent senti-

ment: "This case illustrates the thesis that unlimited jurisdiction under Article 136 self-defeatingly attracts unlimited litigation which, in turn, clogs up and slows down to zero-speed the flow of ultimate decisions . . . ."

103. A.I.R. 1980 S.C. 856.

104. *Id.* at 862.

105. See, *e.g.*, *Som Prakash* v. *Union of India*, A.I.R. 1981 S.C. 212 (Bharat Petroleum Corporation Limited is a "State" within article 12 of the Constitution).

106. But see *Bhim Singhji* v. *Union of India*, A.I.R. 1981 S.C. 234, 238.

107. Justice Krishna Iyer has followed Judge Learned Hand's prescription "that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject." L. Hand, "Sources of Tolerance," in *The Spirit of Liberty* (3d ed. Dilliard 1960) 81. Justice Krishna Iyer would indeed considerably enlarge the list, to include Buddha and Mahavira, Manu and Kautilya, Gandhi and Nehru—as is richly borne out by his judgments.

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